Argued

165-194

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 400.

THOMAS C. PLATT, PRESIDENT OF THE UNITED STATES EXPRESS COMPANY, APPELLANT,

vs.

EBENEZER W. POE, AUDITOR OF THE STATE OF OHIO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED JANUARY 9, 1896.

(16,134.)

80 Supreme Court of United States, October Term, 1896.

JAMES C. FARGO, President of the American Express Company, Appellant,
vs.
EBENEZER W. POE, Auditor of the State of Ohio.

No. 399. Stipulation.

It is agreed that in printing the record in this case everything may be omitted except the bill, the exhibit to the bill, the final decree, and the petition for appeal and assignment of errors, all of the rest of the record being identical with the record in the case of Clarence A. Seward, vice-president of the Adams Express Company, appellant, *vs.* Ebenezer W. Poe, auditor of the State of Ohio, No. 398, October term, 1896, which is set down to be heard with this case.

LAWRENCE MAXWELL, JR.,
Counsel for Appellant.
FRANK S. MONNETT,
Attorney General of Ohio.
J. K. RICHARDS,
Of Counsel for Appellee.

81 [Endorsed:] Case No. 16,133. Supreme Court U. S., October term, 1896. Term No., 399. James C. Fargo, pres't, &c., appellant, *vs.* Ebenezer W. Poe, auditor of the State of Ohio. Stipulation to omit parts of record in printing. Filed July 10, 1896.

Endorsed on cover: Case No. 16,133. S. Ohio C. C. U. S. Term No., 399. James C. Fargo, president of the American Express Company, appellant, *vs.* Ebenezer W. Poe, auditor of the State of Ohio. Filed January 9, 1896.

Dec 10 Argued Brewer

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INDEX.

	Original.	Print.
Caption (omitted in printing)	1	—
Bill of complaint	2	1
Subpœna (omitted in printing)	15	—
Motion for preliminary injunction (omitted in printing)	16	—
Order for restraining order (omitted in printing)	17	—
Restraining order (omitted in printing)	19	—
Bond for costs (omitted in printing)	21	—
Bond for injunction (omitted in printing)	24	—
Marshal's return of restraining order (omitted in printing)	28	—
Marshal's return of subpœna (omitted in printing)	28	—
Affidavit of Ebenezer W. Poe (omitted in printing)	29	—
Exhibit A—Senate bill No. 212 (omitted in printing)	37	—
B—Proceedings of State board of appraisers (omitted in printing)	42	—
Motion to dissolve injunction (omitted in printing)	47	—
Exhibit "A" to bill—Annual statement of property of U. S. Express Co.	47	9

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 13, 1896.

	Original.	Print.
Transcript of proceedings of State board of appraisers (omitted in printing)	76	—
Copy of correspondence between counsel, &c. (omitted in printing)	81	—
Demurrer (omitted in printing)	89	—
Decree, &c.	90	29
Petition for appeal and assignment of errors	91	30
Supersedeas bond (omitted in printing)	92	—
Clerk's certificate (omitted in printing)	94	—
Citation (omitted in printing)	95	—
Proof of service of citation (omitted in printing)	96	—
Stipulation to omit parts of record in printing	97	30

* * * * * * *

Bill of Complaint.

United States Circuit Court, Southern District of Ohio, Eastern Division.

THOMAS C. PLATT, President of the United States Express Company,
vs.
EBENEZER W. POE, Auditor of the State of Ohio, Defendant.
} Bill of Complaint.

To the judges of the circuit court of the United States for the southern district of Ohio, eastern division:

Thomas C. Platt, of New York and a citizen of the State of New York, brings this bill against Ebenezer W. Poe, a citizen of the State of Ohio, residing in the eastern division of the southern district of Ohio, residing in the eastern division of the southern district of said State; and thereupon your orator complains and says—

That he is the president and a shareholder of the United States Express Company, which is a copartnership, organized many years ago in the State of New York as a joint stock association and ever since doing business as such, with its principal office and place of business in the city of New York. Said company consists of about 2,000 partners or shareholders, owning 100,000 shares, all of whom have a joint ownership and interest in the cause of action hereinafter set forth, but they are too numerous to be joined as parties hereto, and your orator therefore, as such president and shareholder in said company, brings this suit in behalf of said association and all the shareholders thereof; that said Ebenezer W. Poe is auditor of the State of Ohio.

That on May 10, 1894, the General Assembly of said State passed an act for the taxation of express, telegraph, and telephone
3 companies doing business in said State, by which the auditor, attorney general, and treasurer of State are designated the State board of appraisers and assessors for said express, telegraph, and telephone companies, of which board the auditor of State is *ex officio* president. Said act (sec. 2778) requires express companies engaged in the business of conveying to, from, or through the State of Ohio or any part thereof money, packages, gold, silver, plate, or other articles by express, not including the ordinary lines of transportation of merchandise and property in said State, to file annually with the auditor of State between the 1st and 31st days of May a statement under oath, a form to be prescribed and prepared by the auditor, containing "a detailed statement of the real estate owned by the company in Ohio, where situate, and the value thereof as assessed for taxation, and a full and correct inventory of the personal property, including moneys and credits, owned by the com-

pany in Ohio on the 1st day of May, where situate and the value thereof," and in addition thereto the following facts:

The number of shares of the company's capital stock.

The par value and the market value, or, if there be no market value, the actual value, of its shares of stock on the 1st day of May.

The total value of real estate owned by the company and situate outside of Ohio.

The total value of personal property owned by the company and situate outside of Ohio.

The entire gross receipts of the company, from whatever source derived, for the year ending the 1st day of May of business wherever done.

The gross receipts for the year ending the 1st day of May,
4 from whatever source derived, of each office within the State of Ohio, and the total gross receipts of the company for such period in Ohio.

The whole length of the lines of rail and water routes over which the company did business on the 1st day of May and the length of so much of said lines of land and water transportation as is without and is within Ohio, naming lines within Ohio.

Said act provides for the assessment of express companies by said State board in the following manner, to wit:

"SECTION 2778. On the meeting of the board the auditor of State shall lay before the board the statements and schedules returned to him under sec. 2778. The said board shall proceed to ascertain and assess the value of the property of said express, telegraph and telephone companies in Ohio and in determining the value of the property of said companies in this State, to be taxed within the State and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

That said express company is and for a great many years last past has been engaged in the express business in the United States, which business consists in carrying packages on passenger and express trains, steamboats, and stages in the care and custody of the employees of the company, who always accompany the packages. The company has no ownership of nor interest in any of the said means of conveyance in the State of Ohio, but merely pays the
5 railroad companies and the owners of steamboats and stage coaches in said State for the passage of its messengers and their accompanying packages. Aside from certain real estate owned by said company in Hamilton & Cuyahoga counties, Ohio, used by it for stabling purposes and there duly assessed for taxation, it has no property in the State of Ohio, except certain horses, wagons, harness, trucks, safes, and office fixtures, located at different points in the State, the items of principal value being horses, wagons,

and trucks, which are used by the company in the collection and delivery of packages in the various towns and cities. There is nothing peculiar about any of said property; it is of the ordinary kind, whose true value in money is easily ascertained and determined by ordinary standards. Your orator insists that in ascertaining and determining the value of said property it is neither necessary nor proper, as contemplated by said act, to take into consideration either the par or market value of the company's shares or the character and amount of its property, real or personal, in other States or the amount of the gross receipts of the company from its business in Ohio or elsewhere; but that its said property should be valued in its hands as similar property is valued in the hands of all other owners; that a horse is a horse, harness is harness, a wagon is a wagon, a truck is a truck, and a safe is a safe, whether owned by express companies or by other persons or associations, and the value of such property should be ascertained and determined for purposes of taxation against express companies according to the true value of such articles as determined by their market price, which is the method adopted by the State in valuing similar property and all other property in the hands of all other persons, associations, or corporations.

6 That nevertheless, at the request of said Poe, auditor of State, but denying his right and the right of said board to require it to make any such report or statement, said company made a statement as required by said act of May 10, 1894, upon the form prescribed by the defendant, showing the number of its capital shares and the market value thereof, so far as said market value could be shown on May 1, 1895; a detailed statement of the real estate owned by the company in Ohio, where situate, and the value thereof as assessed for taxation; a full and correct statement of the personal property, including moneys and credits, owned by the company in Ohio on the 1st day of May, where situate, and the value thereof; the total value of the real estate owned by the company and situate outside of Ohio; the total value of its tangible personal property situate outside of Ohio; its gross receipts for the year ending May 1, 1895, from whatever source derived, within the State of Ohio, and the total gross receipts of the company for such period in Ohio; and the whole length of the lines of rail and water routes over which the company did business on the first day of May, 1895, and the length of so much of said lines of land and water transportation as is without and is within Ohio, naming lines within Ohio, a copy of which report is filed herewith, marked "Exhibit A."

The true value in money of all the company's property in the State on May 1st, 1895, aside from its said real estate, upon which all taxes have been paid, together with the moneys and credits of the company within the State, is given in Schedule B of said report and amounts in all to the sum of $28,438.00, and on May

7 1, 1895, said company had no other property in the State of Ohio or subject to the taxing jurisdiction of said State.

That said State board of appraisers and assessors received and

accepted said statement, and, without making any objection thereto or complaint thereof or calling for other information, made an assessment fixing the amount upon which said company is to be assessed for taxation in Ohio for the year 1895 at the sum of $488,264.70, and has reported said valuation to the auditor of State, as required by sec. 2780 of said act, and the auditor of State, unless restrained by the court, will, on August 15, 1895, in pursuance of said section, after deducting the value of said company's real estate in the State of Ohio as assessed for taxation, apportion and certify said total value and assessment among the several seventy-two counties in which the company does business in proportion that the gross receipts in each county bear to the entire gross receipts of the State; and said several county auditors will, on receipt of such certification from the auditor of State, place the valuation assigned to their respective counties on the tax duplicate, to the end that taxes may be levied and collected thereon as personal property in such taxing districts, and the taxes will be a cloud and lien upon the company's property in the State.

The rate of taxation in Ohio for the year 1895 varies according to the county from two to three per cent., so that the aggregate assessment against your orator upon said illegal and excessive valuation will amount to between $10,000.00 and $15,000.00, and in one or more of the counties of the State not only the assessment, but the difference between the assessment under said valuation and the assessment upon a true and lawful valuation of said company's property, will exceed $2,000.

That the principal business of said company and of all
8 other express companies doing business in the State of Ohio and subject to said act of May 10, 1894, is interstate commerce, to wit, the carriage of express matter between different States of the Union. More than three-fourths of the business done by it and them in the State of Ohio is interstate commerce or the transportation of express matter across said State between other States and between points in said State and points in other States, although a portion of their business does consist in the transportation of express matter from one point to another in the State of Ohio.

The Adams Express Company, the American Express Company, the United States Express Company, and the National Express Company each filed sworn statements with the auditor of State for the year 1895, showing the following facts:

	Adams.	National.	American.
Number of shares	120,000	.....	180,000
Par value of each share	$100	.....	$100
Market value of each share	$140 to 150	.....	112
Taxable value of real estate owned by the company in Ohio	$25,170	.....	$58,660
Value of personal property, including moneys and credits, owned by the company in Ohio	$42,065	$5,973	$23,430
Total value of real estate owned outside of Ohio	$3,005,157 50	.....	$4,891,259
Entire gross receipts from whatever source derived within the State for same year	$282,181 00	$19,321	$275,446
Whole length of lines of rail and water routes over which the company is doing business	29,647 miles.	4,035 miles.	35,295 miles.
Length of such lines without the State	27,518 "	3,698 "	33,564 "
Length of such lines within the State	2,129 "	337 "	1,731 "
Total value of tangible personal property owned outside of Ohio	$1,117,426 05	.....	$1,661,759

9 And the said board made against said companies the following assessments, to wit:

The Adams Express Company	$533,095 80
The American Express Company	499,373 60
The United States Express Company	488,264 70
The National Express Company	28,981 50

Whereupon said companies, as soon as they were advised of said assessments, addressed to said board the following communication:

Hon. E. W. Poe, auditor of State and pres't State board of appraisers.

DEAR SIR: The assessments made by your honorable board against the Western Union Telegraph Company and the express companies represented by us are — manifestly excessive, and in the case of the express companies, at least, are without any foundation that we can see to support them as assessments of property within the State of Ohio, that we are obliged to protest and apply for a correction of the assessments prior to their certification to the county auditors; and, in order that we may address your board intelligently, we should like to know upon what calculation, if any, the apparently precise amounts of the assessments, especially in the case of the express companies, are based and how the figures are arrived at. We respectfully submit that, being officers of the law, bound by law, you should furnish this information in order that the correctness of the basis of your assessments may be submitted fairly and intelligently to the test of law; otherwise we cannot help feeling that the assessments, especially in the case of the express companies, are

arbitrary and wholly without reference to the value of any property within the State, for the companies have submitted to you schedules of their property, money, and credits within the State, the correctness of which they are prepared to establish if questioned, and the character of the property is such (horses, wagons, safes, harness, furniture, etc.) that there is not much room for difference of opinion on questions of valuation. They are unable to understand how these valuations came to be *interested* from ten to twenty fold.

An early answer will oblige,

Very respectfully,

RAMSEY, MAXWELL & RAMSEY,
Attorneys for the Western Union Telegraph Co., the Adams, American, United States, and National Express Companies.

Said board has made and will make no answer to said communication or correct said assessment, and your orator believes and charges that said assessment against said company was not made or intended to be made by said State board upon the basis of the value of the company's property within the State or upon any estimate of the value of its said property as property, but altogether upon other considerations, and that said sum so assessed was not arrived at by any process of valuation, calculation, or apportionment, but was an amount determined by said board arbitrarily upon the simple consideration that said company, in view of the market value of its shares, should pay in the State of Ohio a tax on the basis of said assessment wholly without reference to the value of any property owned by the company within the State. Your orator believes and charges that said assessment was fixed at an apparently precise figure by said board for the sole purpose of giving to it the semblance of an amount arrived at by process of valuation, calculation, or apportionment.

Your orator insists that said act of May 10, 1894, and said assessment made thereunder against said company are in contravention of the Constitution of the United States, especially of the interstate-commerce clause of section 8, article 1; section 2, article 4, and of section 1, article 14, and of the constitution of the State of Ohio, especially sections 2 and 5 of article 12, and of section 1 of article 2, because said act provides for the assessment of and the assessment embraces property not situated within the jurisdiction of the State of Ohio; the said act provides for the assessment of property for taxation and the taxation thereof, and the said assessment so made by the State board deliberately and intentionally assesses said company's property for taxation without regard to its value and in excess of its value; and this said act provides for the assessment of the property of express companies for taxation in a manner and by a method different from the manner and method provided and required by the laws of the State of Ohio in respect of the same kind of property owned by other persons within the said State and of which the same use is made under the same circum-

stances and conditions; and the said assessment is not in fact an assessment against the company in respect of its property held and owned by it in the State of Ohio, but is really and deliberately and intentionally an attempt to enforce against the company, under the guise of taxing its property within the State, the payment of a tax upon its business, which is largely interstate commerce, or for the privilege of doing such business in said State placing a fictitious and artificial value upon its property. The scheme of taxation contemplated by said law, while professing to provide for taxation of property in the State of Ohio, does not in fact do so, inas-
12 much as it directs the State board of appraisers, in determining the value of the property of express companies in said State for the purpose of taxation, to be "guided by the value of said property as determined by the value of the entire capital stock of said company * * * in the proportion which the same (viz., the property of the companies within the State) bears to the entire property of said companies, as determined by the value of the capital stock thereof," whereas the value of the capital stock or shares of said company and of express companies generally is determined, not so much by the value of the property and appliances which they use in carrying on their business as by the skill, diligence, fidelity, and success with which they conduct their business. Said company employs many thousands of men, who are constantly engaged in carrying express packages, many of them of great value, from one part of the country to another, and its income and the value of its shares are largely the result of their efforts, fidelity, and integrity, and of skillful management and supervision of the business. Said company furthermore owns bonds, stocks, and other securities aggregating millions of dollars, none of which are held or taxable in the State of Ohio, and many of them not taxable at all, all of which however, together with the business connections of the company and the reputation and good will which it has earned in the course of more than fifty years of public service, enter largely into the value of its capital shares. Nor can the value of the company's property in the State of Ohio be ascertained, even approximately, by applying or considering the proportion which its routes in Ohio bears to the total mileage of its routes, because its earnings are not uniform and in Ohio are less than its average earnings per mile of all its routes. Nor does the market price of the company's shares
13 afford any fair, reasonable, or just method of estimating the value of its property or fixing a basis of value for the purpose of taxation, because the market price is speculative and variable, depending upon financial conditions not at all connected with this company, its business or its property. And your orator insists that said scheme of taxation is unfair, illegal, unjust, and unequal, and is a regulation of and tax upon interstate commerce and a taking of its property without due process of law, which, if enforced against this company, will destroy the value of its business in Ohio and compel it to abandon the State, to its great and irreparable injury. Said company has duly reported to the auditor of State and to the various county au-

ditors the amount and value of all its personal property, including moneys and credits, in the various counties of the State, as set forth in Schedule B of Exhibit A. None of the assessments of taxes for the year 1895 have yet been made nor the rates determined, so that said company, although ready and willing, has not been able to pay or tender the taxes properly assessable against it in the various counties for the year 1895, but it is able, ready, and willing to pay the same as soon as they are assessed or the amount can be ascertained, and your orator offers to do so and offers as a condition of obtaining a preliminary or perpetual injunction under this bill to pay the approximate or estimated sum properly assessable against it into the registry of the court or otherwise to make such deposit or give such security as the court may direct.

Unless your orator can obtain the injunction prayed for in this bill against the auditor of State, said company will be obliged to bring 72 separate suits for injunction against the various county auditors of the State, or to defend against 72 separate suits 14–46 for the collection of the taxes in various counties. To the end, therefore, that your orator and said company may not be subjected to the multiplicity of suits which would otherwise be necessary, and that said company may be spared irreparable injury and its property not subjected to an illegal cloud and lien, your orator prays for a writ of subpœna against said Ebenezer W. Poe to appear and make full and true answer to this bill, but not under oath, and especially to show how and upon what calculation, if any, the amount — said assessment was arrived at, and upon the final hearing of the cause that he may be perpetually enjoined from apportioning or certifying the said assessment made by said State board against said company to the auditors of any of the counties of the State, and that he and they may be enjoined from taking any steps thereunder; that in the meantime a restraining order and an injunction may be issued pending the suit to the same effect, and that upon the final hearing said assessment may be declared null and void and cancelled, and that your orator may have all other relief to which he may be entitled in equity.

RAMSEY, MAXWELL & RAMSEY, *Solicitors.*

STATE OF OHIO, }
Hamilton County, } *ss:*

Peyton R. Keim, being duly sworn, says that he is general superintendent of said United States Express Company; that he has read the foregoing bill of complaint; that said bill and allegation thereof are true of his own knowledge except as to matters therein stated to be alleged upon opinion and belief, and as to those matters he believes same to be true.

PEYTON R. KEIM.

Sworn to before me and *pre*scribed in my presence this 13th day of August, 1895.

[SEAL.] JOHN J. TAYLOR, JR.,
Notary Public, Hamilton County, Ohio.

40c. p'd by R., M. & Ramsey.

* * * * * * *

47 And afterwards, to wit, on the 4th day of December, A. D. 1895, the following Exhibit "A" to the bill was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

EXHIBIT "A" TO THE BILL.

48 CLEVELAND, O., 4 *Jun-*, 1895.

1895.

Annual statement of the property of the U. S. Express Co. subject to taxation in the State of Ohio, as required by sections 2777, 2778, 2778*a*, 2779, 2780 of the Revised Statutes, as amended and supplemented by an act passed May 10, 1894, as existing on the 1st day of May, 1895.

AUDITOR OF STATE'S OFFICE, COLUMBUS, OHIO.

To express companies:

This form is submitted for the purpose of procuring property statements from each express company doing business in Ohio. All statements furnished must be made on this blank, and the items called for therein must be given in full. This report must be made out and sworn to by the president, secretary, treasurer, superintendent, or chief officer of such company and filed in the auditor of State's department on or before May 10th of each year.

Respectfully, E. W. POE,
Auditor of State.

49 Nature of company, whether person or persons, association or corporation: Joint stock association.

Under the laws of what State or country organized: New York.

Location of principal office: New York.

Give the name and post-office address of each of the following officers:

President, Hon. Thomas C. Platt, New York.
Secretary, Dan. P. Eells, Cleveland, O.
Auditor, R. P. Hayes, Jersey City.
Treasurer, Theodore F. Wood, New York.
General manager, C. H. Crosby, Chicago.
Chief officer or managing agent in Ohio, E. W. Mitchell, Cleveland, O.

Number of shares	100,000
Par value of shares	$100
Market value $40 (if there be no market value give the actual value)	40

Taxable value of real estate owned by the company in Ohio	22,190
Value of personal property, including moneys and credits, owned by the company in Ohio	28,438
Total value of real estate owned outside of Ohio	
Total value of personal property owned outside of Ohio	
Entire gross receipts from whatev-r source derived	
Entire gross receipts from whatever source derived within the State	358,519 00
Whole length of lines of rail and water routes over which the company is doing business	
Length of such lines without the State	
Length of such lines within the State	3,011 miles.

50 SCHEDULE A.—*Detailed Statement of the Value of the Real Property as Assessed for Taxation in Each Township, City, Village, and Special School District, with Total for Each County.*

Names of counties.	Names of townships, cities, villages, and special school districts.	Value of real estate and buildings as assessed for taxation.	Total value in county.
		Dollars.	*Dollars.*
Cuyahoga	Cleveland	$6,730	
Hamilton	Cincinnati	14,000	
Lucas	Toledo	1,460	

51 SCHEDULE B.—*Detailed Statement of the Value of Personal Property, Including Moneys and Credits, in Each Township, City, Village, and Special School District, with Total for Each County.*

Names of counties.	Names of townships, cities, villages, and special school districts.	Value of personal property, moneys, and credits.	Total value in county.
		Dollars.	*Dollars.*
Athens	Athens	$225	
	Glouster	50	
			$275
Allen	Beaver Dam	5	
	Bluffton	60	
	Delphos	30	
	Lima	370	
			465

Schedule B—Continued.

Names of counties.	Names of townships, cities, villages, and special school districts.	Value of personal property, moneys, and credits.	Total value in county.
		Dollars.	*Dollars.*
Auglaize	Minster	30	
	New Bremen	30	
	St. Mary's	40	
			100
Belmont	Barnesville	30	
	Bellaire	80	
	Midland	30	
	Bridgeport	30	
			170
Butler	Hamilton	360	
	Middletown	130	
			490
Clarke	Springfield	390	390
Crawford	Bucyrus	155	155
Clinton	Wilmington	70	70
Cuyahoga	Cleveland	5,860	
	O. Falls	40	
			5,900
Clermont	Loveland	20	20
Darke	Arcanum	40	
	Greenville	90	
			130
Defiance	Defiance	330	
	Hicksville	20	
			350
Erie	Ceylon	43	
	Huron	40	
	Vermillion	40	
	Sandusky	560	
			683
Fairfield	Bremen	10	10
Fayette	Wastg. C. H	140	140
Franklin	Columbus	1,810	1,810
Fulton	Wauseon	30	30
Greene	Xenia	80	80
Huron	Wakeman	30	
	Norwalk	150	
	Bellevue	50	
	Collins	50	
	Monroeville	30	
			310

Schedule B—Continued.

Names of counties.	Names of townships, cities, villages, and special school districts.	Value of personal property, moneys, and credits.	Total value in county.
		Dollars.	*Dollars.*
Henry.....	Holgate.....	60	
.....	Deshler.....	20	
			80
Hancock.....	Findlay.....	340	340
Highland.....	Hillsboro.....	190	190
Hamilton.....	Cincinnati.....	7,200	7,200
53			
Jackson.....	Coalton.....	40	
.....	Jackson.....	90	
.....	Wellston.....	70	
			200
Knox.....	Centerburg.....	55	
.....	Mt. Vernon.....	90	
			145
Lake.....	Painesville.....	60	60
Licking.....	Johnstown.....	20	
.....	Newark.....	320	
			340
Lorain.....	Amherst.....	50	
.....	Oberlin.....	150	
.....	Lorain.....	190	
.....	Elyria.....	165	
			555
Lawrence.....	Ironton.....	160	160
Lucas.....	Toledo.....	1,890	1,890
Mercer.....	Celina.....	45	45
Medina.....	Medina.....	40	40
Montgomery.....	Dayton.....	1,640	1,640
Morrow.....	Mt Gilead.....	50	50
Meigs.....	Middleport.....	50	
.....	Pomeroy.....	20	
			70
54			
Muskingum.....	Zanesville.....	220	220
Miami.....	Piqua.....	160	
.....	Troy.....	120	
			280
Mahoning.....	Youngstown.....	210	210
Ottawa.....	Elmore.....	20	

Schedule B—Continued.

Names of counties.	Names of townships, cities, villages, and special school districts.	Value of personal property, moneys, and credits.	Total value in county.
		Dollars.	*Dollars.*
.....	Oak Harbor	50	
.....	Marblehead.....	50	
			120
Putnam	Col. Grove.....	60	
.....	Ottawa.....	50	
			110
Portage.....	Ravenna	15	15
Perry.....	Corning.....	60	
.....	N. Lexington	30	
.....	Rendville	40	
.....	Shawnee	20	
			150
Pike.....	Waverly	30	30
Richland	Mansfield	160	
.....	Shelby	30	
			190
Ross.....	Bainbridge	55	
.....	Chillicothe	290	
			345
Summit	Akron	390	390
Scioto	Portsmouth... ...	135	135
Sandusky	Clyde	145	
.....	Fremont	240	
			385
Seneca.....	Tiffin	220	
... .	Fostoria.....	310	
			530
Shelby	Sidney	160	160
Trumbull.....	Warren	90	90
Tuscarawas	Uhrichsville	30	30
Vinton	Hamden	30	30
Wood	Bowling Green	140	
... .	No. Balto.....	40	
			180
Warren	Carlisle	20	20
Wyandot.....	Carey	55	55
Williams.....	Bryan	55	55
Washington	Marietta.....	125	125
			$28,438

56 SCHEDULE D.—*Return of Gross Receipts as Contemplated by Section 2778 of Revised Statutes of Ohio as Amended May 1 1894.*

Names of counties.	Names of townships, cities, villages, and special school districts.	Amount of gross receipts in each taxing district as designated in column 2.	Total gross receipts in county.
		Dollars.	*Dollars.*
Allen	Beaver Dam	172 56	
	Delphos	357 64	
	Bluffton	762 80	
	Cairo	95 84	
	Spencerville	366 60	
	Lima	8,928 40	
			10,683 84
Athens	Albany	483 23	
	Glouster	662 60	
	Hubbardsville	75 81	
	Jacksonville	542 60	
	Trimble	330 50	
	Chauncey	89 85	
	Millfield	38 98	
	Amesville	150 49	
	Broadwill	94 08	
	Lathrop	332 34	
	Sharpsburg	120 19	
	Utley	164 94	
	Athens	1,369 47	
	Canaanville	38 63	
	Carbondale	23 75	
	Coolville	121 05	
	Daleton	26 65	
	Frost	44 48	
	Guysville	46 80	
	Marshfield	25 82	
	Mineral	13 65	
	Stewart	40 15	
	Torch	48 05	
			4,914 11
Ashland	Hereford	47 68	
	Nova	68 84	
	Sullivan	144 01	
			260 53
Auglaize	Buckland	274 98	
	Wapakoneta	3,117 39	
	Minster	704 28	
	New Bremen	480	

Schedule D—Continued.

Names of counties.	Names of townships, cities, villages, and special school districts.	Amount of gross receipts in each taxing district as designated in column 2.	Total gross receipts in county.
		Dollars.	*Dollars.*
.....	Cridersville	416 98	
.....	St. Mary's	2,657 52	
			7,641 15
57			
Butler	Middleton	2,445 27	
.....	Trenton	270	
.....	Overpeck	15 65	
.....	Oxford	1,939 59	
.....	Poast Town	21 30	
.....	Jones	68 50	
.. ..	Hamilton	3,461 87	
			8,222 18
Belmont	Barnesville	1,169 40	
.....	Bellaire	1,192 85	
.....	Bailey's Mills	16 13	
.....	Belmont..... ..	239 90	
.....	Bethesda	175 40	
.....	Burton's.....	15 33	
.....	Franklin	36 96	
.....	Glencoe	69 18	
.....	Lewis' Mill	103 71	
.....	Olney.....	58 15	
.....	St. Clairsville	913 50	
.....	Warnock	66 27	
.....	Bruce	55 67	
.. ..	Barton	180 45	
.....	Bridgeport	595 27	
.....	Fairpoint.....	81 81	
.....	Flushing	537 35	
.....	Maynard	233 63	
.....	Martin's Ferry	195 29	
			5,936 25
Clinton	Cuba.....	65 55	
.....	Midland City	937 17	
.....	Melvin	18 16	
.....	Reeseville	81 31	
.....	Sabina	717 93	
.....	Wilmington	2,571 96	
.....	Blanchester.....	330 36	
.....	Farmers...	79 45	
... .	Martinsville	36 60	

Schedule D—Continued.

Names of counties.	Names of townships, cities, villages, and special school districts.	Amount of gross receipts in each taxing district as designated in column 2.	Total gross receipts in county.
		Dollars.	*Dollars.*
.....	N. Vienna	1,368 95	
.....	Westboro.....	495 38	
			6,702 82
58			
Clermont.....	Hill's	874 81	
.....	.....	1,701 34	
			2,576 15
Clarke	So. Charleston.....	647 10	
.....	Springfield	3,865 19	
			4,512 29
Crawford...	Bucyrus.....	2,500 48	
.....	N. Washington....	259 43	
.....	Lemert.....	108 45	
.....	Chatfield.....	34 60	
			2,902 96
Cuyahoga	Berea	446 52	
.....	Rockport	119 95	
.....	O. Falls....	185 89	
.....	Cleveland	27,626 76	
			28,379 12
Darke	Arcanum.....	482	
.....	Gordon.....	110 85	
.....	Greenville	1,673 06	
.....	Versailles	290 94	
....	Yorkshire.....	131 38	
			2,688 23
Defiance	Del. Bend.....	14 25	
.....	Defiance.....	848 53	
.....	Hicksville.	607 70	
.....	Mark Centre.....	221 58	
.....	Sherwood	233 38	
			1,925 44
Erie...	Kimball.....	34 19	
.....	Castalia	411 50	
.....	Ceylon	204 69	
.. ..	Huron.....	584 49	
... .	Vermillion	805 20	
.....	Venice	54 26	
.....	Sandusky	7,146 89	
			9,241 22

Schedule D—Continued.

Names of counties.	Names of townships, cities, villages, and special school districts.	Amount of gross receipts in each taxing district as designated in column 2.	Total gross receipts in county.
59			
		Dollars.	*Dollars.*
Franklin	Brice	71 25	
	Harrisburg	88 26	
	Black Lick	92 68	
	Grove City	163 56	
	Pleasant Corner	25 49	
	Columbus	18,031 75	
			18,472 99
Fairfield	Balto	225 28	
	Basil	322 83	
	Bremen	264 60	
	Millersport	219 19	
	Pleasantville	213 34	
	Rushville	107 83	
	Thurston	93 65	
			1,446 72
Fayette	Good Hope	127 93	
	Milledgeville	309 02	
	Parrott	72 85	
	Jeffersonville	609 62	
	Bloomingburg	283 85	
	Cook's	47 03	
	Madison Mill	119 35	
	Washington C. H.	4,785	
			6,354 65
Fulton	Archbold	651 57	
	Delta	750 55	
	Fayette	437 65	
	Swanton	710 69	
	Wauseon	1,697 85	
			4,248 31
Gallia	Gallia Furnace	88 89	
	Gallipolis	1,584 20	
			1,673 09
60			
Greene	Jamestown	1,584 77	
	Xenia	1,203 52	
			2,788 29
Guernsey	Cumberland	41 88	
	Cambridge	1,978 11	
	Campbell's	116 38	
	Cassill's	190 82	

Schedule D—Continued.

Names of counties.	Names of townships, cities, villages, and special school districts.	Amount of gross receipts in each taxing district as designated in column 2.	Total gross receipts in county.
		Dollars.	*Dollars.*
.....	Gibson	33 27	
.....	Hartford	8	
.....	Quaker City.....	665 23	
.....	Senecaville.....	253 19	
.....	Salesville	139 03	
.....	Spencer's.....	70 65	
			3,496 56
Hamilton	Ivorydale....	105 68	
.....	Lockland	430 55	
.....	Carthage	123 65	
.....	Winton Pl.....	118 90	
... ...	Glendale	638 40	
.....	Hartwell	360	
.....	Mt. Healthy.... ..	45 48	
.....	Stock Yards.....	81 12	
.....	Remington.....	11 50	
.....	Bond Hill.....	20 15	
.....	Cumminsville.....	67 90	
.....	East Norwood.....	52 90	
.....	Madeira.....	14 75	
.....	Madisonville.....	84 05	
.....	Oakley	23 83	
... ...	Cincinnati.....	19,138	
			21,316 86
Geauga..... .	Burton	723 20	
.....	Chardon.....	856 58	
.....	East Claridon.....	179 25	
.....	Middlefield.....	375 30	
			2,134 33
61			
Huron.....	Boughtonville.....	36 90	
.....	Centerton	18 45	
.....	Chicago Junc.....	877 80	
... .	Greenwich.....	103 05	
... .	Havana.....	202 52	
.....	New Haven.....	49 25	
.....	Bellevue	1,303 88	
.....	Collins	133 08	
. .....	New London... ..	205 80	
.....	Monroeville.....	1,501 23	
....	Norwalk	2,606 83	
.....	Wakeman....	417 28	
			7,456 07

Schedule D—Continued.

Names of counties.	Names of townships, cities, villages, and special school districts.	Amount of gross receipts in each taxing district as designated in column 2.	Total gross receipts in county.
		Dollars.	*Dollars.*
Hancock	Arcadia	187 90	
	McComb	796 90	
	Arlington	233 80	
	Findlay	7,445 27	
	Jenera	119 47	
	Mt. Blanchard	418 64	
	Mt. Cory	126 10	
	Rawson	317 11	
	Stuartsville	21 43	
	Williamstown	78 18	
	Van Buren	132 96	
			9,877 76
Harrison	Freeport	315 41	
	Piedmont	225 54	
			540 95
Hardin	Dunkirk	469 50	
	Kenton	1,695 52	
	Ridgeway	54 34	
			2,219 36
Henry	Deshler	976 77	
	Hamlet	413 23	
	Holgate	331 14	
			1,721 14
62			
Highland	E. Monroe	12 80	
	Greenfield	1,009 80	
	Highland	101 05	
	Hillsboro	966 37	
	Leesburg	287	
	Lynchburg	201 05	
	Russell	7	
			2,585 07
Jackson	Coalton	496 75	
	Cove	122 74	
	Glen Roy	208 57	
	Rocky Hill	48 43	
	Berlin X Roads	30 85	
	Byer	201 05	
	Camba	39 38	
	Cross Roads	35 59	
	Jackson	897 83	

Schedule D—Continued.

Names of counties.	Names of townships, cities, villages, and special school districts.	Amount of gross receipts in each taxing district as designated in column 2.	Total gross receipts in county.
		Dollars.	*Dollars.*
.....	Oak Hill.....	218 93	
.....	Raysville.....	123 75	
.....	W. Furnace.....	30 65	
.....	Wellston.....	879 64	
			3,334 16
Knox.....	Centerburg.....	169 05	
.....	Ankenytown.....	48 35	
.....	F'r'dktown	886 13	
.....	Hurts.....	16 70	
.....	Mt. Vernon.....	2,121 55	
			3,241 78
Lorain.....	Amherst.....	885 47	
.....	Brownhelm.....	75 45	
.....	Elyria.....	3,767 40	
.....	Kipton.....	175 66	
.....	Oberlin	2,822 75	
.....	Shawville	160 97	
.....	Belden	358 02	
.....	Lorain	1,625 48	
.....	Grafton.....	41 75	
			9,912 93
63			
Licking.....	Black Hand.....	79 68	
.....	Clay Lick.....	22 54	
.....	Col. Centre.....	12 11	
.....	Kirkersville.....	136 57	
.....	N. Rds.....	52 35	
.....	Newark	5,305 26	
.....	Pataskala.....	247 38	
.....	St. Louisville	69 38	
.....	Summit	57 35	
.....	Union.....	25 55	
.....	Utica	732 55	
.....	Vanatta.....	10 33	
.....	Alexandria.....	205	
.....	Granville.....	561 84	
.....	Hebron	237 01	
.....	Johnston	580 46	
			8,335 36
Lawrence	Ironton	988 88	
.....	Mt. V. Furnace....	57 55	
			1,046 43

Schedule D—Continued.

Names of counties.	Names of townships, cities, villages, and special school districts.	Amount of gross receipts in each taxing district as designated in column 2.	Total gross receipts in county.
		Dollars.	*Dollars.*
Lucas	Wagon Works	228 60	
	Sylvania	114 83	
	Toledo	21,024 62	
			21,368 05
Lake	Painesville		581 32
Logan	Horton	11 55	
	W. Mansfield	397 81	
			409 36
Madison	So. Solon	453 59	
	Mt. Sterling	428 04	
			881 63
Muskingum	Claypool	110 83	
	Duncan Falls	10 10	
	Gaysport	7 25	
	Norwich	190 53	
	New Concord	437 05	
	Pl. Valley	27 15	
	Sonora	61 19	
	Zanesville	4,659 02	
			5,503 02
Mahoning	Lowville	150 13	
	Struthers	15 07	
	Youngstown	1,377 81	
			1,543 01
Morgan	Bishopville	28 01	
	McConnellsville	145 40	
			173 41
Medina	Homerville	59 91	
	Lodi	307 20	
	Seville	1,047 82	
	Medina	523 60	
	Spencer	102 25	
	Erhart	72 98	
	Chip Lake	352 75	
	Litchfield	105 43	
	Mal. Creek	98 07	
	Sharon Centre	104 26	
			2,774 27
Meigs	Carpenter	204 21	
	Dexter	169 97	

Schedule D—Continued.

Names of counties.	Names of townships, cities, villages, and special school districts.	Amount of gross receipts in each taxing district as designated in column 2.	Total gross receipts in county.
		Dollars.	*Dollars.*
... .	Dyesville.....	70 95	
.....	Langsville.....	105 96	
.....	Middleport.....	675 62	
.....	Pomeroy	483 40	
.....	Rutland.....	88 75	
			1,798 86
65			
Mercer.....	Celina.....	1,669 53	
.....	Coldwater	103 20	
.....	Ft. Recovery.....	724 20	
.....	Chickasaw	154 96	
.....	Maria Stein.....	421 61	
....	Mendon	277 28	
.....	Mercer	53 83	
			3,404 61
Marion	Martel	.....	79 42
Miami..... ..	Troy	4,330 07	
.....	Piqua.....	4,104 26	
... .	Tippecanoe	205 30	
.....	Covington.....	451 15	
.....	Pl. Hill	272 48	
... .	W. Milton	329 46	
			9,692 72
Montgomery	Brookville.....	278 69	
....	Dayton..... ...	12,856	
....	Trotwood.....	32 40	
....	Wengerlawn.....	65 47	
....	West Balto.....	341 36	
...	Miamisburg.... ..	1,200 33	
....	Tadmor	400 08	
....	Centreville.....	61 22	
			15,235 55
Morrow	Edison	142 77	
.....	Fulton	126 07	
....	Marengo	281 80	
.....	Mt. Gilead	510 25	
			1,060 89
Pickaway	Derby	351 12	
.....	Morgans	303 13	
.....	Palestine.....	29 04	
			683 29

Schedule D—Continued.

Names of counties.	Names of townships, cities, villages, and special school districts.	Amount of gross receipts in each taxing district as designated in column 2.	Total gross receipts in county.
66			
		Dollars.	*Dollars.*
Ottawa	Elmore	771 84	
	Genoa	635 01	
	Graytown	210 55	
	Gypsum	164 37	
	La Carne	66 65	
	Lakeside	288 05	
	Marblehead	200 16	
	Martin	155 15	
	Oak Harbor	470 82	
	Port Clinton	1,360 99	
	Rocky Ridge	135 30	
			4,458 89
Putnam	Pandora	120	
	Belmore	113 71	
	College Hill	199 32	
	Leipsic	1,360 33	
	Col. Grove	1,416 16	
	Ottawa	1,725 02	
	Vaughnsville	107 95	
			5,042 49
Perry	Corning	1,176 33	
	Moxahala	225 94	
	New Lexington	451 54	
	Rendville	218 67	
	Chalfant's	15 08	
	Glenford	110 50	
	Junction City	204 60	
	Mt. Elroy	21 35	
	Shawnee	669 97	
	Somerset	866 50	
	Thornport	19 76	
			3,980 24
Pike	Beavertown	271 71	
	Waverly	472 47	
			614 18
Portage	Cyclone	48 36	
	Kent	204 35	
	Ravenna	203 45	
			456 16
67			
Ross	Anderson	105 43	
	Chillicothe	3,517 22	

Schedule D—Continued.

Names of counties.	Names of townships, cities, villages, and special school districts.	Amount of gross receipts in each taxing district as designated in column 2.	Total gross receipts in county.
		Dollars.	*Dollars.*
... .	Lyndon	139	
.....	Musselman	74 75	
.....	Roxabell	51 92	
... .	Vigo	173 14	
....	Austin	89 50	
.....	Bainbridge	632 40	
.....	Fruitdale	133 57	
.....	Denver	22 16	
.....	Frankfort	743 48	
.....	Storms	60	
....	Summit	48 75	
			5,791 32
Richland	Belleville	566 89	
.... ..	Butler	407 86	
.....	Lexington	335 39	
. .. ..	Mansfield.....	3,569 28	
.... ..	Plymouth	568 71	
.....	Shelby	336 01	
			5,784 14
Summit.....	Akron	3,334 56	
.....	Baberton	184 20	
.....	Cuy. Falls.....	188 22	
... .	Clinton	24 12	
.....	M. Falls..... ..	18 05	
.....	Warwick	33 98	
			3,783 13
Stark	Beach City.....	262 30	
.....	Canal Fulton.....	519 78	
....	Justus...	102 18	
.....	Massillon	3,464 85	
			4,447 11
Sandusky	Burgoon.....	285 43	
.....	Clyde	1,199 17	
.....	Fremont	4,312 23	
.....	Lindsday	191 35	
.... ..	Vickery	77 60	
			6,065 78
68			
Shelby.....	Anna	361 90	
.....	Botkins	525 89	
.....	Kirkwood	44 66	

Schedule D—Continued.

Names of counties.	Names of townships, cities, villages, and special school districts.	Amount of gross receipts in each taxing district as designated in column 2.	Total gross receipts in county.
		Dollars.	*Dollars.*
.....	Sidney	2,637 59	
.....	Swander's	27 49	
			3,597 53
Seneca.....	Fostoria.....	3,634 88	
.....	Kansas	192 50	
.....	New Riegel.....	105 79	
.....	Attica	439 23	
.....	Bascom	77 70	
.....	Republic	306 96	
.....	Scipio	22 90	
.....	Tiffin	2,870 03	
			7,649 99
Scioto	Hale's Creek.....	53 27	
.....	Portsmouth.....	1,731 59	
.....	Sciotoville.....	29 82	
.....	S. Webster.....	189 52	
.....	Eifort	13 50	
			2,017 70
Tuscarawas	Canal Dover.....	441 08	
.....	Midvale.....	192 32	
.....	New Phila.....	1,470 10	
.....	Strasburg.....	140 73	
.....	Uhrichsville	1,023 28	
.....	Dennison	210 36	
			3,479 87
Trumbull.....	De Forest.....	47 80	
.....	Girard	44 05	
.....	Leavittsburg	26 93	
.....	Min. Ridge	39 94	
.....	Niles.....	396 80	
.....	Newton Falls	409 11	
.....	West Farmington..	690 65	
.....	Warren	767 67	
			2,422 95
69			
Union	Marysville	1,236 68	
.....	Arnold	34 80	
.....	Raymond's	102 15	
			1,373 63
Vinton	Hamden	181	
.....	Mt. Arthur.....	108 80	

Schedule D—Continued.

Names of counties.	Names of townships, cities, villages, and special school districts.	Amount of gross receipts in each taxing district as designated in column 2.	Total gross receipts in county.
		Dollars.	*Dollars.*
....	Vinton	10 13	
.....	Zaleski	121 55	
			421 48
Williams.....	Bryan.....	1,386 20	
.....	Edgerton	417 91	
.....	Stryker.....	627 20	
			2,431 31
Wayne	Armstrong	33 81	
.....	Burbank	36 96	
.....	Cedar Valley.....	12 15	
....	Preston	239 98	
.....	Doylestown	435 42	
....	Rittman..	32 15	
.....	Sterling	185 84	
.....	Wooster	925 45	
			1,901 76
Washington	Lowell	6 25	
.....	Cutler.....	129 75	
.....	Fleming..... ...	20 86	
.....	Napier	27 51	
....	Quayles	26	
.....	Vincent	189 70	
.....	Belpre	119 24	
.....	Constitution	13 65	
.....	Little Hocking....	95 28	
.....	Marietta	1,790 29	
.....	Porterfield	18 58	
.....	Rockland	2 40	
			2,430 14
70			
Wood	Bairdstown	245 40	
.....	Bloomdale	472 29	
.....	Hoyt's Corner.....	265 64	
.....	North Balto.....	2,080	
.....	Welker.....	225 07	
.....	Trombley.....	383	
.....	Lime City	199 60	
.....	Hatton	109 27	
.....	Prairie Depot	1,045 47	
..... .	Custar.....	349 48	
.....	Luckey.	280 56	

Schedule D—Continued.

Names of counties.	Names of townships, cities, villages, and special school districts.	Amount of gross receipts in each taxing district as designated in column 2.	Total gross receipts in county.
		Dollars.	*Dollars.*
.....	Millbury	68 16	
.....	Milton	319 04	
.....	Pemberville	785 47	
.....	Rudolph	96 10	
.....	Stony Ridge	122 49	
.....	Haskins	165 77	
.....	Perrysburg	342 07	
.....	Portage	307 45	
.....	Tontogany...	285 05	
.....	Weston....	151 16	
.....	Bowling Green....	4,396 10	
.....	Bays.....	227 28	
.....	Cygnet.....	1,298 18	
.....	Dunbridge.....	115 15	
.....	Mermill.....	142 02	
			14,677 27
Warren.....	Carlisle	170 80	
.....	Lebanon	291 57	
.....	Lytle	15 53	
.....	Cozaddale	269 60	
.....	Pl. Plain	749 47	
			1,496 97
Wyandot	Carey	250 83	
.....	Deunquat	50 83	
.....	McCutchenville ...	113	
.....	Sycamore.....	655 32	
			1,069 98

71 SCHEDULE E.—*Showing the Name and Length of Lines of Rail and Water Transportation over which the Company is Doing Business in Ohio.*

Names of lines.	Length of lines.
Balto. & Ohio Southwestern	291
Pittsburg & Western.....	116
Balto. & Ohio	576
Eastern Ohio	19
Muskingum River..	26
Lake Shore & Mich. Sou.....	342
Cin., Ham. & Dayton	533

Toledo & Ohio Central	346
Clev'd, Lorain & Wheeling	166
Pittsb'g, Akron & Western	165
Lake Erie & Western	150
Ohio Southern	118
Kanawha & Michigan	67
Dayton & Union	47
Dayton & Lebanon	23
Cin. & N'thwestern	8
Cin. & Westwood	8
St. Clairsville & Mo	3
Lakeside — Marblehead	7
	3,011

72 Aside from the real estate mentioned in the accompanying schedule situated in Hamilton, Cuyahoga, and Lucas counties, and there duly assessed for taxation, the United States Express Co. has no property in the State of Ohio except certain horses, wagons, harness, trucks, safes, and office fixtures located at different points. The actual value of this property in money, together with the moneys and credits of the company within the State, is given in Schedule " B," hereto attached, together with the location of the various items.

The business of the company in the State consists in carrying packages on passenger and express trains, steamboats, and stages, in the care and custody of its employees who carry the packages. The express company has no ownership of or interest in any of these means of conveyances; it simply pays to the railroad companies and the owners of steamboats and stage coaches for the passage of its messengers and their accompanying packages. The horses, wagons, and trucks are used by it in the collection and delivery of these packages. There is nothing peculiar about its property; it is of the ordinary kind whose true value in money must be measured by the ordinary standards and is easily ascertained and determined.

The company respectfully insists that in ascertaining and determining the value of said property it is neither necessary nor proper to take into consideration either the par or market value of its shares or the character and amount of its property, real or personal, in other States, or the amount of gross or net receipts of the company from its business in Ohio or elsewhere.

73 The company insists that property of this kind, which is the only personal*ly* property owned or held by it in the State of Ohio, should be valued in its hands as all similar property is valued in the hands of other owners.

74 THE STATE OF OHIO, }
County of Cuyahoga, } ss:

On the 12th day of June, 1895, personally appeared before me, the undersigned, a notary public in and for said Cuyahoga county, E. N. Matthews, who, being duly sworn, says that he is the superin-

tendent of the United States Express Company, and that the foregoing statement is correctly taken from the books of said company and is true to the best of his knowledge and belief.

E. N. MATTHEWS.

Subscribed and sworn to before me the day and year above written.

[NOTARIAL SEAL.] JOSEPH C. BLOCH.

75–89 U. S. Express Co.

CLEVELAND, O., 3 *June*, 1895.

Hon. E. W. Poe, chairman of the State board of appraisers & ass'rs.

DEAR SIR: This "return" is made under protest upon the ground that the law compelling it is in contrevention of the Constitution of the United States and of the State of Ohio.

Very respectfully, E. M. MATHEWS, *Sup't.*

* * * * * * *

90 And afterwards, to wit, on the 5th day of December, A. D. 1895, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal C, page 90.

Demurrer to Bill Sustained, Injunction Dissolved, &c.

This cause came on to be heard upon the bill and the exhibit and the demurrer of the defendant to the bill, it being stipulated by counsel that the transcript of the proceedings of the State board of appraisers & assessors, and also the correspondence between the parties as disclosed in the copies thereof on file, shall be treated as part of the record the same as if made exhibits to the bill. On consideration whereof the court sustains the demurrer, dissolves the preliminary injunction heretofore granted, and dismisses the bill at the costs of the plaintiff. Thereupon the plaintiff presents his petition for appeal to the Supreme Court of the United States, and his assignment of errors, and the appeal is allowed in open court and the appeal bond fixed at $5,000.00, and upon application of the plaintiff it is ordered that the order dissolving the injunction
91 be, and the same is hereby, suspended pending the appeal, until or unless otherwise ordered by the Supreme Court.

Nothing in this order shall relieve the plaintiff's company from payment of taxes for the year 1895 on its personal property, moneys, and credits in the various counties, in accordance with its return thereof to the State board, and the order suspending the dissolution of the injunction is upon condition that it shall pay said taxes for the year 1895 accordingly or tender payment thereof to the various county treasurers at the time when the taxes for 1895 are due.

And afterwards, to wit, on the same day as aforesaid, the following petition for appeal and assignment of errors was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Petition for Appeal and Assignment of Errors.

United States Circuit Court, Southern District of Ohio, Eastern Division.

THOMAS C. PLATT, President of the United States Express Company,
vs.
EBENEZER W. POE, Auditor, &c. } No. 740.

Petition for appeal and assignment of errors.

The plaintiff prays an appeal from the decree dismissing the bill to the Supreme Court of the United States and assigns for error that the court erred in sustaining the demurrer to the bill, in dissolving the preliminary injunction, and in dismissing the bill.

92–96 The plaintiff especially insists that the assessment complained of is not in fact an assessment against his company in respect of its property held or owned by it in the State of Ohio or within the taxing jurisdiction of the State, but is really an attempt, under the guise of taxing its property within the State, to enforce against it the payment of a tax upon its business, which is largely interstate commerce, or for the privilege of doing such business in the State by placing a fictitious or artificial value upon its property, and that said assessment and the statute of Ohio purporting to authorize the same are therefore in contravention of the Constitution of the United States, especially of the interstate-commerce clause of section 8, article 1, and of section 2, article 4, and of section 1, article 14.

The plaintiff prays for an order continuing the temporary injunction pending the appeal to the Supreme Court.

LAWRENCE MAXWELL, JR., *Counsel.*

* * * * * * *

97 Supreme Court of the United States, October Term, 1896.

THOMAS C. PLATT, President of the United States Express Company, Appellant,
vs.
EBENEZER W. POE, Auditor of the State of Ohio. } No. 400. Stipulation.

It is agreed that in printing the record in this case everything may be omitted except the bill, the exhibit to the bill, the final decree, and the petition for appeal and assignment of errors, all the rest of the record being identical with the record in the case of

Clarence A. Seward, vice-president of the Adams Express Company, appellant, *vs.* Ebenezer W. Poe, auditor of the State of Ohio, No. 398, October term, 1896, which is set down to be heard with this case.

LAWRENCE MAXWELL, JR.,
Counsel for Appellant.
FRANK S. MONNETT,
Attorney General of Ohio.
J. K. RICHARDS,
Of Counsel for Appellee.

98 [Endorsed:] Case No. 16,134. Supreme Court U. S., October term, 1896. Term No., 400. Thomas C. Platt, pres't, &c., appellant, *vs.* Ebenezer W. Poe, auditor, &c. Stipulation to omit parts of record in printing. Filed July 10, 1896.

Endorsed on cover: Case No. 16,134. S. Ohio C. C. U. S. Term No., 400. Thomas C. Platt, president of the United States Express Company, appellant, *vs.* Ebenezer W. Poe, auditor of the State of Ohio. Filed January 9, 1896.

The Supreme Court of the United States.

OCTOBER TERM, 1896.

Nos. 337, 338, 339, 340, 352, 398, 399, 400, 401, 405,

NICHOLS TAX LAW CASES.

Appeals from the Circuit Court of the United States for the Southern District of Ohio, and from the United States Circuit Court of Appeals for the Sixth Circuit.

EXHIBIT BOOK

Containing the Nichols Law and other Taxing Statutes of Ohio, the Opinions delivered in the Circuit Court, and in the Circuit Court of Appeals, and the Opinion of the Supreme Court of Ohio in State ex rel. vs. Jones.

Printed by JAMES BARCLAY, 108-118 Canal St., Strobridge Building, Cincinnati, O.

INDEX.

	Page.
Nichols Law of 1893	1
Nichols Law of 1894	6
Sections 2777-2780, before the amendment thereof by the Nichols Law	12
The Statutes of Ohio, for the taxation of all other personal property than that of express, telegraph and telephone companies	15
Express Companies Excise Tax Law	39
Judge Taft's several Opinions in the Circuit Court—	
Opinion filed March 14, 1894	42
Opinion holding Nichols Law Unconstitutional, filed April 23, 1894 (Telegraph case)	49
Opinion holding Nichols Law Unconstitutional, filed April 23, 1894 (Express case)	80
Opinion filed November 8, 1894, in both cases, granting rehearing	88
Final Opinion, dismissing bills, filed April 8, 1895	95
Opinions in Circuit Court of Appeals—	
In Express case	101
In Telegraph case	118
Opinion of Supreme Court of Ohio in State *ex rel. vs.* Jones	122

succeeding year, at such time as the president thereof shall appoint. And said board shall proceed to ascertain the entire amount and value of the personal and real property of said express, telegraph and telephone companies. And such board shall have power to require, from the president, secretary, treasurer, receiver or principal accounting officer of such express, telegraph and telephone companies, a detailed statement, under oath, of all the items and particulars constituting such property, moneys, credits, and the value thereof, and may examine books and papers of such companies, and any or all of its officers, receivers, servants, or agents, under oath, touching any matter relating to the same; and any member of such board is authorized and empowered to administer such oath. It shall be the duty of said board to report annually, on or before the first Monday in the month of June, to the auditor of state, the total value of the property of said companies, and the value assessed against said companies for their property in the state of Ohio, and the distribution of the same as hereinafter provided, all of which shall be, by the auditor of state, communicated to the general assembly, with his annual report, in tabular form. And said board shall have and may exercise all the powers possessed by county auditors under sections 2781 to 2785, inclusive, of the Revised Statutes; and said express, telegraph and telephone companies shall be subject to all the provisions and penalties of said section.

Annual returns by such companies.

Sec. 2778a. Every express, telegraph and telephone company embraced in section 2777, whether chartered by the laws of this state, or any other state or country, doing business in this state, shall, annually, between the first and tenth days of May, return to the auditor of state, under the oath of its treasurer, the amount of its capital stock, its place of business, the par value and market value (or if there be no market value, then the actual value) of its shares at the time of said return. The return shall also contain a statement in detail of the entire real and personal property of said companies and where located, and the value thereof as assessed for taxation; and telegraph and telephone companies shall, in addition thereto, return the whole length of their lines, and the length of so much of their lines as is without and is within the state of

Ohio, which lines shall include what said telegraph and telephone companies control and use, under lease or otherwise; and said board of appraisers and assessors shall, in determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio, in the proportion which the same bears to the entire property of said corporations, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid. Express companies shall, in making said return, include therein, as a part thereof a statement of their entire gross receipts for the year ending the first day of May, of the business done within the state of Ohio, giving the receipts of each office in said state and the location thereof for said year.

Penalties to which officers, agents, etc., of such companies liable for misdemeanors.

Sec. 2779. Any president, secretary, receiver, accounting officer, or agent of any express, telegraph or telephone company, having any portion of its lines or doing business in this state, who shall refuse to attend before said board when required so to do, or refuse to submit to the inspection of said board any book or papers of such express, telegraph or telephone company, in his possession, custody or control, or shall refuse to answer such questions as may be put to him by such board, or its order touching the business, property, moneys and credits, and the value thereof, of said express, telegraph or telephone company, shall be guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction, shall be confined in the jail of the county not exceeding thirty days, and be fined in any sum not exceeding five hundred dollars and costs; and any president, secretary, receiver, accounting officer, servant or agent, as aforesaid, so refusing as aforesaid, shall be deemed guilty of contempt of such board, and may be confined by order of said board in the jail of the proper county until he shall comply with such order, and pay the costs of his imprisonment.

Apportionment of valuation of telegraph and telephonecompanies: rate of taxation.

Sec. 2780. The value of said property, moneys and credits of any telegraph or telephone company, as found and determined by such board, shall be apportioned by said board

among the several counties through which the lines of such telegraph or telephone company, or any part thereof, run, so that to each county, city, village, township and district, or part thereof therein, shall be apportioned such part thereof as shall equalize the relative value of the entire property of such company therein, in proportion to the whole value of the entire property of said company, and in the proportion that the length thereof, in all said counties, cities, villages, townships and districts, and any part thereof therein, and the board shall certify to the county auditor of each county, and to each city, incorporated village, township or district, or any part thereof therein, the amount proportioned to his county, and said board shall make and forward a like certificate, together with all the reports of the various telegraph and telephone officers, and other papers and evidence which formed the basis of their valuation, to the auditor of state. It shall be the duty of the county auditor, upon receiving the certificate aforesaid, to apportion the amount therein stated to the cities, villages, townships, districts, or parts thereof, and the auditor shall put the same on the tax list to be assessed, and the taxes thereon collected the same as taxes assessed and collected on other personal property. And the rate of taxation shall be the same as that assessed against real and personal property in said cities, villages, townships and districts.

Apportionment of valuation of express companies; rate of taxation.

Sec. 2780a. The value of said property, moneys and credits of any express company, as found and determined by such board, to be assessed for taxation within this state, shall be apportioned by said board among the several counties in which said express companies do business, in the proportion that the gross receipts of the business of said express companies in the places where they transact business, bear to the entire gross receipts in this state of said express companies. And the board shall certify to the county auditor of each county, and to each city and incorporated village, township or district, or any part thereof therein, the amount proportioned to his county, and said board shall make and forward a like certificate to go with all the reports of the various express companies, and other papers and evidence, which form the basis of their valuation, to the auditor of state. It shall be the duty of the county auditor, upon receiving the certifi-

cate aforesaid, to apportion the amount therein stated to the cities, villages, townships, districts, or parts thereof, and the auditor shall place the same on the tax list to be assessed and collected, the same as taxes are assessed and collected on other property. And the rate of taxation shall be the same as that assessed against real and personal property in said cities, villages, townships and districts.

Exemption from provisions of section 2744; deduction of valuation of real estate.

Sec. 2780b. Express, telegraph and telephone companies shall not be required to make returns, and shall not be governed by the provisions of section 2744 of the Revised Statutes; and the valuation of any and all real estate situate in this state as assessed for taxation, and on which said companies pay taxes, shall, by said board, be deducted from the total value of the property of said companies, as ascertained and determined under the provisions of the foregoing sections for taxation.

Compensation of board of appraisers and assessors.

Sec. 2. The board of appraisers and assessors herein created shall receive as compensation for their services, when performed as herein provided, the sum of five hundred dollars each per year.

Repeals.

Sec. 3. That sections 2777, 2778, 2779 and 2780 of the Revised Statutes are hereby repealed.

Sec. 4. This act shall take effect from and after its passage.

Passed April 27, 1893.

NICHOLS LAW OF 1894,

91 OHIO LAWS, 220.

An Act to amend sections 2777, 2778, 2778a, 2779 and 2780 of the Revised Statutes, and to repeal an Act entitled, "An Act to amend and supplement sections 2777, 2778, 2779 and 2780 of the Revised Statutes of Ohio," passed April 27, 1893 (90 O. L. 330).

Sec. 1. Be it enacted by the General Assembly of the State of Ohio, that sections 2777, 2778, 2778a, 2779 and 2780, of the Revised Statutes of Ohio, be amended so as to read as follows:

Express, telegraph and telephone companies defined.

Sec. 2777. Any person or persons, joint-stock association or corporation, wherever organized or incorporated, engaged in the business of conveying to, from, or through this state, or any part thereof, money, packages, gold, silver, plate or other article, by express, not including the ordinary lines of transportation of merchandise and property in this state, shall be deemed to be an express company; any person or persons, joint-stock association or corporation, wherever organized or incorporated, engaged in the business of transmitting to, from, through, or in this state, telegraphic messages, shall be deemed to be a telegraph company; and any person or persons, joint-stock association or corporation, wherever organized or incorporated, engaged in the business of transmitting to, from, through, or in this state, telephonic messages, shall be deemed to be a telephone company.

Annual statements to auditor of state.

Sec. 2778. Every express, telegraph and telephone company, defined in section 2777, doing business in this state, shall, annually, between the first and thirty-first days of May, under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state of such association or corporation, if an association or corporation, make and file with the auditor of state a statement, in such form as the auditor of state may prescribe, containing the following facts:

1. The name of the company.

2. The nature of the company, whether a person or persons, or association or corporation, and under the laws of what state or country organized.

3. The location of its principal office.

4. The name and post-office address of the president, secretary, auditor, treasurer and superintendent or general manager.

5. The name and post-office address of the chief officer or managing agent of the company in Ohio.

6. The number of shares of the capital stock.

7. The par value and market value, or if there be no market value, the actual value of its shares of stock on the first day of May.

8. A detailed statement of the real estate owned by the company in Ohio, where situate, and the value thereof as assessed for taxation.

9. A full and correct inventory of the personal property, including moneys and credits, owned by the company in Ohio on the first day of May, where situate, and the value thereof.

10. The total value of the real estate owned by the company and situate outside of Ohio.

11. The total value of the personal property owned by the company and situate outside of Ohio.

12. In the case of telegraph and telephone companies, the whole length of their lines, and the length of so much of their lines as is without and is within the state of Ohio, which lines shall include what said telegraph and telephone companies control and use under lease or otherwise; also the miles of wire in each taxing district in Ohio.

13. In the case of telegraph and express companies, the entire gross receipts of the company, from whatever source derived, for the year ending the first day of May, of business wherever done.

14. In the case of telegraph and express companies, the gross receipts for the year ending the first day of May, from whatever source derived, of each office within the state of Ohio, and the total gross receipts of the company for such period in Ohio.

15. In the case of express companies, the whole length of the lines of rail and water routes, over which the company

did business on the first day of May, and the length of so much of said lines of land and water transportation as is without and is within Ohio, naming the lines within Ohio.

16. Such other facts and information as the auditor of state may require in the form of returns prescribed by him Blanks for making the above statement shall be prepared, and, on application, furnished any company by the auditor of state. Express, telegraph and telephone companies shall not be required to make returns, under, and shall not be governed by the provisions of section 2744 of the Revised Statutes.

State board of appraisers and assessors; constitution, powers, duties, etc.

Sec. 2778a. The auditor of state, treasurer of state and attorney-general shall constitute a board, named the state board of appraisers and assessors, of which board the auditor shall be ex-officio president. In the absence or inability of the auditor, the board shall appoint one of its members president pro tempore. The board shall appoint a secretary and full minutes of its proceedings shall be kept. The board shall, annually, on the first Monday in June, meet in the office of the auditor of state, for the purpose of assessing the property of express, telegraph and telephone companies in Ohio. On the meeting of the board, the auditor of state shall lay before the board the statements and schedules returned to him under section 2778. The said board shall proceed to ascertain and assess the value of the property of said express, telegraph and telephone companies in Ohio, and in determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid. The board may adjourn from time to time until the business before it is finally disposed of. In case any company fails or refuses to make the statement required by law, or furnish the board any information requested, the board shall inform itself, as best it may, on the matters necessary to be known, in order to dis-

Method of fixing assessments.

charge its duties with respect to the assessment of the property of such company. At any time, after the meeting of the board on the first Monday in June, and before the assessment of the property of any company is determined, any company or person interested shall have the right, on written application, to appear before the board and be heard in the matter of the valuation of the property of any company for taxation. After the assessment of the property of any company for taxation by the board, and before the certification by the auditor of state of the apportioned valuation to the several counties, as provided in section 2780, the board may, on the application of any interested person or company, or on its own motion, correct the assessment or valuation of the property of any company, in such manner as will, in its judgment, make the valuation thereof just and equal. The provisions of section 167 of the Revised Statutes shall apply to the correction of any error or over valuation in the assessment of property for taxation by the state board of appraisers and assessors, and to the remission of taxes and penalties illegally assessed thereon.

Correction of assessments.

Sec. 2779. In case any company required to file a statement under the provisions of section 2778, fails to make and file such statement on or before the thirty-first day of May, such company shall be subject to a penalty of five hundred dollars, and an additional penalty of one hundred dollars for each day's omission after the thirty-first day of May to file such statement, said penalty to be recovered by action in the name of the state, and, on collection, paid into the state treasury to the credit of the general revenue fund. The attorney-general on the request of the state board of appraisers and assessors, shall institute such action against any company so delinquent in the court of common pleas of Franklin county. That the state board of appraisers and assessors shall have power to require the president, secretary, treasurer, receiver, superintendent or managing agent, or other officer, or employe or agent, of any express, telegraph and telephone company to attend before the board, and bring with him for the inspection of the board, any books or papers of such company in his possession, custody or control, and to testify under oath touching any matter relating to the business, property, moneys or credits and the value thereof, of such company.

Penalty for failure to file statements.

Further powers of state board.

Any member of the board is authorized and empowered to administer such oath. Any officer, employe or agent of such company who shall refuse to attend before the board when required to do so, or shall refuse to bring with him and submit for the inspection of the board any books or papers of such company in his possession, custody or control, or shall refuse to answer any question put to him by the board or any member thereof, touching the business, property, moneys and credits and the value thereof, of such company, shall be guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction shall be fined not more than five hundred dollars or imprisoned not more than thirty days, or both; and any officer, employe or agent of such company so refusing, as aforesaid, shall be deemed guilty of contempt of such board, and may be confined, by order of said board, in the jail of the proper county until he shall comply with the requirement of the board and pay the costs of his imprisonment. The state board of appraisers and assessors shall have and may exercise all the powers possessed by county auditors under sections 2781 to 2785 inclusive, of the Revised Statutes; and said express, telegraph and telephone companies shall be subject to all the provisions and penalties of said sections.

Report of board; filing of statements, etc.

Sec. 2780. The state board of appraisers and assessors shall, on or before the first Monday in August, report to the auditor of state the total value of the property of express, telegraph and telephone companies in Ohio, as ascertained and assessed by the board, at the same time, the board shall file with the auditor of state the statements of the various companies and other papers before it. The auditor of state shall deduct from the total value of the property of each of said companies in Ohio, the value, as assessed for taxation, of any real estate situate in Ohio and owned by such company. The value of the property of said companies in Ohio, after deducting the value of the real estate, shall be apportioned by the auditor of state among the several counties through or into which the lines of such telegraph or telephone companies run, so that to each county shall be apportioned such part of the entire valuation as will equalize the relative value of the property of the company therein, in proportion to the whole value of the property of the company in the state, and

Deduction of value of real estate.

in the proportion that the length of the lines of wire owned by the company in the county bears to the whole length of the lines of wire in the state. The value of the property of any express company shall be apportioned by the auditor of state among the several counties in which the company does business, in the proportion that the gross receipts in each county bear to the entire gross receipts in the state. The auditor of state shall, on or after the fifteenth day of August, certify to the county auditor the amount apportioned to his county, and the county auditor, upon receiving such certificate, shall apportion the amount therein stated among the cities, villages, townships or other taxing districts, after the same method used for the apportionment of the valuation in the state among the other counties; and the county auditor shall place the apportioned valuation on the tax duplicate and taxes shall be levied and collected thereon at the same rate and in the same manner as taxes are levied and collected on other personal property in the taxing district in question.

Apportionment and taxation of valuation.

Sec. 2. An act entitled "An act to amend and supplement sections 2777, 2778, 2779 and 2780 of the Revised Statutes of Ohio," passed April 27, 1893 (90 O. L. 330), and sections 2777, 2778, 2778a, 2779, 2780, 2780a and 2780b, of the Revised Statutes, as amended and enacted therein, are repealed, and this act shall take effect and be in force from and after its passage.

Repeals, etc.

Passed May 10, 1894.

Sections 2777, 2778, 2779, 2780 of the Revised Statutes of Ohio, before the Amendment thereof by the Nichols Law.

When deemed express or telegraph company.

Sec. 2777. Any person or persons, joint-stock association, or corporation, conveying to, from, or through this state, or any part thereof, money, packages, gold, silver, plate, or other article, by express, not including the ordinary lines of transportation of merchandise and property, in this state, shall be deemed to be an express company; and any person or persons, joint-stock association or corporation, engaged in transmitting to, from, through, or in this state, telegraphic messages, shall be deemed and held to be a telegraph company [59 v. 91, sec. 5.]

Returns by foreign express and telegraph companies of receipts.

Sec. 2778. Each agent of any express company, or telegraph company, having its principal office in any other state or country, and doing business in this state, shall, annually, in the month of May, make and deliver to the auditor of the proper county in which such agent has his place of business, a statement, verified by the oath of such agent, showing the entire receipts of such agent for the year then next preceding for and on account of such company including its proportion of gross receipts for business done by such company in connection with lines of other companies outside of the limits of this state; provided, that the amount which any express company actually pays to the railroads within this state, for the transportation of their freight within this state, may be deducted from the gross receipts of such company as above ascertained, and the balance thus found as to the express companies, and the gross receipts as above ascertained for the telegraph companies, shall be by said auditor entered upon the duplicate of his county against said company: provided, further, that nothing herein shall release such company from the provisions of section twenty-seven hundred and forty-four; and provided, further, if such company have a principal agent in this state, superintending its other agents within this state, and to whom its other agents account for all the receipts and expenses of their respective agencies, then such principal agent may make the returns in their respective counties herein required, in accordance with the provisions of this chapter, of all the agen-

Is not to release from return of property.

General agent may make returns.

cies within the state; such agent or agents, in making statement of such receipts, shall include as such all sums earned or charged of the business for such preceding year, whether actually received or not. [62 v. 174, sec. 1.]

Proceedings in probate court when agent refuses to make statement.

Sec. 2779. If any agent of such express or telegraph company shall neglect or refuse to make and return such statement, it is hereby made the duty of the auditor of the county in which such agent has his office or place of business, to ascertain the amount so received by such agent, and for that purpose he is hereby authorized to institute proceedings in the probate court of the proper county, in the name of the state, against said agent, to compel the appearance of such agent before said court, to answer such questions as may be put to him relating to his agency and the subject matter thereof. It shall be the duty of said probate judge, on complaint of any county auditor that any such agent has refused or neglected to make the statement required by the next preceding section, to compel the attendance of said agent before him by the process of the court, and then and there to require him to answer, under oath, all questions that may be put to him relating to his said agency, which examination shall be reduced to writing by said judge, and the costs of such proceedings shall be taxed against said agent personally, and collected as in case of judgment of said courts. From the examination aforesaid, and such other information as the auditor can obtain, he shall ascertain the receipts of said agent, and enter the sum upon his tax-list and duplicate, with fifty per cent. penalty. [59 v. 91, secs. 2, 3.]

Sum and penalty to be entered on tax list and duplicated.

Abstract made by express or telegraph company to be forwarded to the auditor of state.

Sec. 2780. In all cases when the return for taxation is made to the several county auditors by the principal agent of any express or telegraph company, under the provisions of this chapter, it shall be the duty of said principal agent at the same time to forward an abstract thereof to the auditor of state, which said abstract shall contain the amount returned to each county, and the total amount returned to all of said counties. When no return is made to the several county auditors by the principal agent of any express or telegraph company, it shall be the duty of the several county auditors, annually, on or before the first day of August, to report to the auditor of state the amount returned to him by the several agents of any such company in his county, and the amount placed

Duty of county auditors if returns not made.

by such county auditor upon his tax-list and duplicate against such company, which returns shall be by the auditor of state reported to the general assembly with his annual report. [60 v. 11, sec. 1.]

The Statutes of Ohio Governing the Taxation of all other Personal Property than that of Express, Telegraph and Telephone Companies, being Title XIII. (Taxation) Chapter 2 (Personal Property) of the Revised Statutes of 1880, as in force in 1893, 1894 and 1895.

CHAPTER 2.

LISTING PERSONAL PROPERTY.

SECTION.

2734. Who shall list personal property.
2735. Where it shall be listed.
2736. When to be listed and as of what day.
2737. What the statement shall contain, and in what order.
2738. Persons claiming to have nothing to list shall make oath to that fact.
2739. Rules for valuing personal property.
2739*a*. Penalty for violating rules for valuing personal property.
2740. Who are merchants and their statements.
2741. Transient traders and their returns.
2742. Who are manufacturers and their returns.
2743. Merchants and manufacturers commencing business after the day preceding second Monday of April, must make return.
2744. Corporations generally: their returns.
2745. Foreign insurance companies: taxation of their gross premium receipts.
2746. In whose name property shall be listed; but stock in companies which make returns of capital not to be listed by shareholders.
2747. When lists to be made: notice and forms to be given by assessor.
2748. Statements to be verified by oath.
2749. County auditor shall assemble and instruct assessors, and furnish them blanks.
2750. When the assessor shall make the list.
2751. Upon what information the assessor shall act.
2752. When persons may make return after the assessor has made return for them.
2753. Assessor to assess real estate and new structures, and return structures destroyed.
2754. All dogs to be listed, and how.
2755. Returns to be made by the assessor.
2756. He shall also deliver original statements.
2757. His oath to returns.

UNINCORPORATED BANKS AND BANKERS.

2758. Who deemed bankers.
2759. Their statements: how made.
2759*a*. Further statement required.
2759*b*. Applies to incorporated savings banks.
2760. How averages obtained.
2761. Persons commencing business of banking, how to be listed.

INCORPORATED BANKS.

2762. Shares to be listed.
2763. Tax on their real estate.
2764. List of names and residences of stockholders to be kept by banks.
2765. Returns to be made by banks.
2766. Auditor to assess the value of shares, and report to board of equalization.
2767. The board's action thereon. [Repealed.]
2768. The valuation as fixed by the board with the bank return to be forwarded to the state auditor. [Repealed.]
2769. Proceedings and penalty when bank fails to make return.

RAILROAD COMPANIES.

2770. County auditors to be board of appraisers.
2771. Who president of the board: quorum: secretary.
2772. When and where to meet, and their duties.
2773. Penalties for not complying with requirements of the board.
2774. Apportionment of valuation of railway property.
2775. Compensation of members.
2776. When road partly in another state, how value found.

EXPRESS AND TELEGRAPH COMPANIES.

2777. Who deemed express or telegraph company.
2778. Returns by foreign companies.
2779. Proceedings upon refusal to submit statements.
2780. Duty of county auditor.

CORRECTIONS OF RETURNS.

2781. Action of auditor upon false return or evasion of return.
2782. His correction of returns.
2783. Penalties for refusal to obey process.
2784. Party refusing to list or swear, to be so returned and fifty per centum added.
2785. Filing away statements.

Who shall list personal property.

Sec. 2734. Every person of full age and sound mind shall list the personal property of which he is the owner, and all

moneys in his possession, all moneys invested, loaned, or otherwise controlled by him, as agent or attorney, or on account of any other person or persons, company or corporation whatsoever, and all moneys deposited subject to his order, check, or draft; and all credits due or owing from any person or persons, body corporate or politic, whether in or out of such county; all money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for the same, if between the parties the same is considered as security merely; the property of every ward shall be listed by his guardian, of every minor child, idiot, or lunatic having no guardian, by his father, if living; if not, by his mother, if living; and if neither father nor mother be living, by the person having such property in charge; of every wife by her husband, if of sound mind, if not, by herself; of every person for whose benefit property is held in trust, by the trustees; of every estate of a deceased person, by his executor or administrator; of corporations whose assets are in the hands of receivers, by such receivers; of every company, firm, or corporation, by the president or principal accounting officer, partner or agent thereof; and all surplus or undivided profits held by any society for savings or bank having no capital stock, by the president or principal accounting officer. [62 v. 105; 75 v. 441, sec. 1; 76 v. 28, sec. 2.]

Where personal property shall be listed.

Sec. 2735. Every person required to list property on behalf of others shall list the same in the same township, city, or village in which he would be required to list it if such property were his own; but he shall list it separately from his own, specifying in each case the name of the person, estate, company, or corporation, to whom it belongs; all merchants' and manufacturers' stock, and all personal property upon farms shall be listed in the township, city, or village in which the same may be situated; and all other personal property, moneys, credits, and investments, except as otherwise specially provided, shall be listed in the township, city, or village in which the person to be charged with taxes thereon may reside at the time of the listing thereof, if such person reside within the county where the same are listed, and if not, then in the township, city, or village where the property is when listed. [62 v. 105, sec. 4.]

When property to be listed, and as of what day.

Sec. 2736. Each person required to list property shall, annually, upon receiving a blank for that purpose from the assessor, or within five days thereafter, make out and deliver to the assessor a statement, verified by his oath, as required by law, of all the personal property, moneys, credits, investments in bonds, stocks, joint-stock companies, annuities, or otherwise, in his possession, or under his control, on the day preceding the second Monday of April of that year, which he is required by law to list for taxation, either as owner or holder thereof, or as parent, husband, guardian, trustee, executor, administrator, receiver, accounting officer, partner, agent, factor, or otherwise; and also of all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, held on said day by another, residing in or out of this state, for, and belonging to the person so listing, or any one residing in this state, for whom he is required by law to list, and not listed by such holder thereof, for taxation in this state. [65 v. 38, sec. 6; 88 v. 96.]

What the statement shall contain, and in what order.

Sec. 2737. Such statement shall truly and distinctly set forth, first, the number of horses, and the value thereof; second, the number of neat cattle, and the value thereof; third, the number of mules and asses, and the value thereof; fourth, the number of sheep, and the value thereof; fifth, the number of hogs, and the value thereof; sixth, the number of pleasure carriages (of whatever kind), and the value thereof; seventh, the total value of all articles of personal property, not included in the preceding or succeeding classes; eighth, the number of watches, and the value thereof; ninth, the number of piano fortes and organs, and the value thereof; tenth, the average value of the goods and merchandise, which such person is required to list as a merchant; eleventh, the value of the property which such person is required to list as a banker, broker, or stock-jobber; twelfth, the average value of the materials and manufactured articles which such person is required to list as a manufacturer; thirteenth, moneys on hand or on deposit subject to order; fourteenth, the amount of credits as hereinbefore defined; fifteenth, the amount of all moneys invested in bonds, stocks, joint-stock companies, annuities, or otherwise; sixteenth, the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects,

within that time invested in, or converted into bonds or other securities of the United States or of this state, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April; and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits under the fourteenth item of this section; but the person making such statement may exhibit to the assessor the property covered by the first nine items of this section, and allow the assessor to affix the value thereof, and in such case the oath of the person making the statement shall be in that regard only that he has fully exhibited the property covered by said nine items. [56 v. 175, sec. 7; 65 v. 38, sec. 6.]

Persons claiming to have nothing to list must make oath to that fact.

Sec. 2738. Any person who being called upon to list property for taxation, claims to have none, either on his own account or of others, subject to taxation, shall be required by the assessor to make oath to the truth of his claim in that behalf. [56 v. 175, sec. 8.]

Rules for valuing personal property.

Sec. 2739. In listing personal property, it shall be valued at the usual selling price thereof, at the time of listing, and at the place where the same may then be; and if there be no usual selling price known to the person whose duty it is to fix a value thereon, then at such price as it is believed could be obtained therefor, in money, at such time and place; investments in bonds, stocks, joint-stock companies, or otherwise, shall be valued at the true value thereof, in money; money, whether in possession or on deposit, shall be entered in the statement at the full amount thereof, except that depreciated circulating notes shall be entered at their current value; every credit for sum certain, payable either in money, property of any kind, labor, or service, shall be valued at the full amount of the sum so payable, except that if it be for a specific article, or for a specified number or quantity of any article or articles of property, or for a certain amount of labor or services of any kind, it shall be valued at the current price of such property or of such labor or service, at the place where payable; and annuities, or moneys receivable at stated periods, shall be valued at the sum which the person listing the same believes them to be worth in money at the time of listing. [56 v. 175, sec. 9.]

Sec. 2739a. Any additions made to the tax-list and dupli-

cate by any board of equalization or county auditor shall be, as to valuations, in strict accordance with the provisions of section 2739; and any officer willfully violating any of the provisions of section 2739 or of this section shall be deemed guilty of a misdemeanor, and on conviction thereof, before any court of competent jurisdiction, shall be sentenced by the court, to pay a fine of two hundred dollars, and it is hereby made the duty of the prosecuting attorney of the county to enforce the provisions of this section. [83 v. 80.]

Penalty for violating rules for valuing personal property.

Sec. 2740. Every person who shall own or have in his possession or subject to his control any personal property within this state, with authority to sell the same, which shall have been purchased either in or out of this state, with a view to being sold at an advanced price or profit, or which shall have been consigned to him from any place out of this state for the purpose of being sold at any place within this state, shall be held to be a merchant; and when he shall be by this chapter required to make out and deliver to the assessor a statement of his other personal property, he shall state the value of such property appertaining to his business as a merchant; and in estimating the value thereof he shall take as the criterion the average value of all such articles of personal property which he shall have had from time to time in his possession or under his control during the year next previous to the time of making such statement, if so long he shall have been engaged in business, and if not, then during such time as he shall have been so engaged; and the average shall be made up by taking the amount in value on hand, as nearly as may be, in each month of the next preceding year in which the person making such statement shall have been engaged in business, adding together such amounts and dividing the aggregate amount thereof by the number of months that the person making the statement may have been in business during the preceding year; provided, that no consignee shall be required to list for taxation the value of any property, the product of this state, which shall have been consigned to him, for sale or otherwise, from any place within the state, nor the value of any property consigned to him from any other place for the sole purpose of being stored or forwarded; provided, he shall, in either case, have no interest in such property, or any

Statement of merchants.

Consignee.

Persons selling on commission.

profit to be derived from its sale. But no person who is engaged in the business of selling on commission and who does not retain control of such property longer than 48 hours shall be held to be a merchant within the meaning of this act. [56 v. 175, sec. 11; 91 v. 351.]

Transient traders: their returns.

Sec. 2741. Whenever any transient person shall locate in any city, village, or township, and shall offer to sell or otherwise dispose of any books or other goods, wares, or merchandise, under the name of a gift book store, or any other name or designation, it shall be the duty of the proper assessor for the time being, of the place where such person shall locate, forthwith to call upon such person, and demand of him the true value in money of all his stock in trade; and in case such person shall neglect or refuse to return the same under oath, within twenty-four hours after such demand, then it shall be the duty of said assessor to determine the same as in other cases, and in either case he shall forthwith return said valuation to the auditor of the county. [58 v. 134, sec. 1.]

Listing of personal property by manufacturers.

Sec. 2742. Every person who shall purchase, receive or hold personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, refining, rectifying, or by the combination of different materials with a view of making a gain or profit by so doing, shall be held to be a manufacturer, and he shall, when he is required to make and deliver to the assessor a statement of the amount of his other personal property subject to taxation, also include in his statement the average value estimated, as provided herein, of all articles purchased, received or otherwise held for the purpose of being used, in whole or in part, in any process or operation of manufacturing, combining, rectifying or refining, and, also, of all articles which were at any time by him manufactured or changed in any way, either by combination or rectifying, or refining or adding thereto which, from time to time, he shall have had on hand during the year next previous to the first day of April annually, if so long he shall have been engaged in such manufacturing business, and if not, then during the time he shall have been so engaged. The said average value shall be ascertained by taking the value of all said property subject to be listed on the average basis, owned by such manufacturers, on the last business day of each month the manufacturer was engaged

in business during the year, adding such monthly values together and dividing the result by the number of months the manufacturer was engaged in such business during the year and the result shall be the average value to be listed. Every such manufacturer shall also list at their fair cash value, all engines and machinery of every description used, or designed to be used, in any process of refining or manufacturing (except such fixtures as shall have been considered a part of any parcel or parcels of real property), including all tools and implements of every kind used, or designed to be used, for the aforesaid purpose, owned or used by such manufacturer. [61 v. 82, sec. 12; 88 v. 341.]

By merchants or manufacturers commencing business after the day preceding the second Monday of April.

Sec. 2743. When any person shall commence business as a merchant or manufacturer in any county after the day preceding the second Monday of April in any year, the average value of whose personal property employed in such business shall not have been previously entered on the assessor's list for taxation in said county, such person shall report to the auditor of the county the probable average value of the personal property by him intended to be employed in such business until the day preceding the second Monday of April thereafter. [56 v. 175, sec. 13.]

Corporations generally: their returns.

Sec. 2744. The president, secretary, and principal accounting officer of every canal or slackwater navigation company, turnpike company, plank-road company, bridge company, insurance company, telegraph company, or other joint-stock company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by any law of this state or not, shall list for taxation, verified by the oath of the person so listing, all the personal property, which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at the actual value in money, in manner following: In all cases return shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each township, village, city, or ward therein. The value of all movable property shall be added to the stationary and fixed property and real estate, and apportioned to such wards, cities, villages,

or townships, pro rata, in proportion to the value of the real estate and fixed property in said ward, city, village, or township, and all property so listed shall be subject to and pay the same taxes as other property listed in such ward, city, village, or township. It shall be the duty of the accounting officer aforesaid to make return to the auditor of state during the month of May of each year of the aggregate amount of all property by him returned to the several auditors of the respective counties in which the same may be located. It shall be the duty of the auditor of each county, on or before the first Monday of May, annually, to furnish the aforesaid president, secretary, principal accounting officer, or agent, the necessary blanks for the purpose of making aforesaid returns; but no neglect or failure on the part of the county auditor to furnish such blanks shall excuse any such president, secretary, principal accountant or agent, from making the returns within the time specified herein. If the county auditor to whom returns are made is of the opinion that false or incorrect valuations have been made, or that the property of the corporation or association has not been listed at its full value, or that it has not been listed in the location where the property belongs, or in cases where no return has been made to the county auditor, he is hereby required to proceed to have the same valued and assessed: provided, that nothing in this section shall be so construed as to tax any stock or interest in any joint-stock company held by the state. [73 v. 139, sec. 16.]

Return and taxation of gross premium receipts of foreign insurance companies.

Sec. 2745. Every agency of an insurance company incorporated by the authority of any other state or government, shall return to the auditor of each county in which such company does business, or from which it collects premiums on or before the first day of May, annually, the amount of the gross premium receipts of such agency for the previous calendar year in such counties; provided, however, that in the case of regular companies, wherein policy-holders participate in the surplus and earnings of the company, dividends or surplus from previous payments allowed and used in the payment of current premiums, cancellation or surrender values, and commissions paid to the citizens of this state, during the same period for which receipts are reported, shall be deducted from such gross receipts, and the net amount after such deductions shall be the basis of taxation

for such companies in the counties, which shall be entered upon the tax list of the proper county, and be subject to the same rate of taxation, for all purposes, that other personal property is subject to at the place where located; and the whole of said tax shall be due and payable on the twentieth day of November next ensuing. And it shall be the duty of the superintendent of insurance, in the month of December, annually, to charge and collect from all such companies such a sum as, added to the sum paid to the county treasuries, will produce an amount equal to two and one half per cent. on the gross premium receipts of such companies, as shown by their annual statements, under oath, to the insurance department; provided, however, that if, by the laws of any other state, territory or nation, a larger tax than two and one half per cent. on such gross premium receipts is charged companies organized under the laws of Ohio, then the superintendent of insurance shall charge a like tax upon companies from such state, territory or nation doing business in this state. If any such company refuse to pay said tax, after demand therefor has been made, or if it shall make any false statement of its gross premium receipts, the superintendent of insurance shall revoke the license of such company to do business in this state. If, at any time, said superintendent has reason to suspect the correctness of the return made of the gross premium receipts of any such company he may, at the expense of the state, make an examination of the books of such company, or of its agents, for the purpose of verifying the same. All taxes collected under the provisions of this section by the superintendent of insurance shall be paid by him, upon the warrant of the auditor, into the general revenue fund of the state. [73 v. 139, sec. 16; 90 v. 201; 91 v. 91.]

Insurance policy on property in Ohio not to be placed in agency outside state.

Sec. 2745a. It shall be unlawful for any insurance company or agent legally authorized to transact insurance business in the state of Ohio to write, place, or cause to be written or placed, any policy or renewal of policy contract for insurance upon property situated or located in the state of Ohio, in or through any such legally authorized company outside of the state of Ohio, and the writing, renewal, placing or causing to be written or placed any such policy of insurance is hereby declared to be a violation of the law providing for the pay-

ment of taxes by foreign insurance companies doing business in the state of Ohio, as set out and provided in section 2745 of an act passed by the general assembly of the state of Ohio April 12, 1889. [88 v. 487.]

Revocation of authority of insurance company violating preceding section.

Sec. 2745b. That any company or companies violating the provisions of sections 2745a of this act, upon notice and satisfactory proof thereof being made to the superintendent of insurance of the state of Ohio, shall have its or their authority to transact business in the state of Ohio revoked for a period of not less than ninety days; and any insurance company whose license to do business in the state of Ohio may be so revoked by the superintendent of insurance of the state of Ohio, shall not be again permitted to do business in the state of Ohio, until all taxes and penalties due thereon shall have been paid, together with any expense that may be due under the provisions of this bill, to the superintendent of insurance of the state of Ohio; and such company shall only be re-admitted to transact business in the state of Ohio upon a complete re-compliance with the laws now in force in regard to the admission of insurance companies to do business in Ohio. [88 v. 488.]

Superintendent of insurance to inspect company charged with violation of law.

Sec. 2745c. That when notice of any violation of the first section of this act is received by the superintendent of insurance of the state of Ohio [that], it shall forthwith be his duty in person, or by deputy, to visit the office of such company or companies where such contract of insurance may have been written or made, and demand an inspection of the books and records of such company or companies; any company or companies refusing to exhibit its or their books and records for his inspection shall be deemed guilty of violating the provisions of the first section of this act, and the penalties provided in this act shall immediately be enforced against such company or companies, by the superintendent of insurance of the state of Ohio. [88 v. 488.]

Expenses of inspection to be paid by company.

Sec. 2745d. The superintendent of insurance of the state of Ohio shall receive, as a compensation for the services rendered under the provisions of this act, his necessary expenses, which sum shall be charged against the company or companies so visited by him, and shall be collected from such company or companies by suit in any court of competent jurisdiction. [88 v. 488.]

In whose name property to be listed: but stock in companies which make return of capital not to be listed by shareholder.

Sec. 2746. Personal property of every description, moneys and credits, investments in bonds, stocks, joint-stock companies, or otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April, in each year; but no person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company. [56 v.175, sec. 59.]

When lists to be made.

Sec. 2747. The listing of all personal property, moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, shall be made between the second Monday of April and the third Monday of May, annually; and the assessor shall, on or before the first Monday of May, annually, leave with each person, resident in each township or ward, of full age, and not a married woman, or insane person, or at the office, usual place of residence or business of each person, a written or printed notice, requiring such person to make out for the assessor a statement of the property which, by law, he is required to list, accompanied with printed forms, in blank, of the statement required; and the assessor shall, at the time he delivers such notice and blank forms, demand and receive such statement, unless such person shall require further time to make out the same, in which case he shall call for the same before the third Monday of May. [56 v. 175 sec. 17.]

Notice and forms to be given by assessors.

Statements to be verified by oath.

Sec. 2748. Every such statement shall be verified by the oath of the person making the same. [56 v. 175, sec. 17.]

State auditor shall furnish county auditors with blank form.

Sec. 2749. The auditor of state shall, annually, on or before the first Monday of April, furnish each county auditor with a blank form of statement for listing personal property, moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, containing all the items required in section 2737, and such subdivisions thereof, and additional items, as he may deem necessary to secure accurate, full and honest returns, and values for taxation; and county auditors, all assessors, and parties required to list all or any of the items named in said statement, shall use true copies of said blank statement, and fill up the blanks therein with the true value in money of the several items therein named; and every person or party so listing property, or other items named in said statement, shall take and subscribe an oath or affirmation ac-

cording to law, to be actually administered by the assessor, to the effect (adapting the form to the capacity in which the person making the return acts), that the statement contains, as he verily believed, a true account of all the taxable personal property, moneys, credits, and investments in bonds, stocks, joint-stock companies, annuities or otherwise, owned or controlled by such party, for his own use, or as husband, parent, guardian, trustee, executor, administrator, receiver, accounting officer, agent, factor, or otherwise, and also of all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, held for him, or any one residing in this state, for whom he is required by law to list, by any party residing in or out of this state, and not listed for taxation in pursuance of law in this state by such holder, and every interest and right, legal or equitable, of the party listing and of those for whom he is required by law to list in any bonds, stocks, joint-stock companies, or otherwise, which he is required by law to list for taxation, and that the value affixed to each of said items is the value thereof as ascertained by the usual selling price thereof for cash, at voluntary sales thereof, at the time and place of listing; and if there be no usual selling price, then at such price as could be obtained therefor in money, at such time and place, and that he has not made any acknowledgment or agreement, or contracted any debt, without receiving an adequate consideration therefor or resorted to any device, or created any trust, or sold or exchanged or disposed of any money, property, or effects, which were taxable in this state, for United States bonds or other non-taxable securities or moneys, for the purpose of evading taxation, or diminishing the amount of his return for taxation, and that all interest that he has or owns in any credit or evidence of indebtedness, secured in any manner, upon real estate or personal property, situated outside of the county in which he resides, or in any taxable stocks or bonds, or in any stocks or bonds of any foreign corporation, has been duly listed by him for taxation. Each county auditor shall, before the fifteenth day of April, annually, issue a call to all the assessors of his county, to meet at his office or some other place designated by him, at the county seat, within five days, for consultation, and said assessors shall meet as so ordered; and the auditor shall meet with said assessors, and answer such questions and

give such instructions as shall tend to a uniformity in the action of the assessors in his county, and it shall be his duty to specially call their attention to the provisions of law relating to their duties, and to the listing of property, and to require of them full compliance therewith; and the auditor shall provide and deliver to said assessors blank forms and instructions, or forward them to the township clerks, immediately after the meeting of said assessors. [62 v. 114, sec. 56; 88 v. 96.]

When assessor shall make the list.

Sec. 2750. When any person shall refuse or neglect to make out or deliver the statement above required, or shall refuse or neglect to take and subscribe the oath thereto, the assessor shall proceed to ascertain the number of each description of the several enumerated articles of personal property and the value thereof, and the value of the unenumerated articles, and the value of the moneys, credits, and investments of such person; and for this purpose the assessor may examine on oath any person or persons whom he may suppose to have a knowledge thereof. [56 v. 175, sec. 18.]

Upon what information the assessor shall act.

Sec. 2751. When such failure to make or verify such statement is occasioned by the sickness or absence of the person who should make or verify the same, or by his neglect or refusal to make or verify the same, the assessor, if unable to obtain positive evidence of the items or value, may make the statement from general reputation and his own knowledge of facts and circumstances. [56 v. 175, sec. 19.]

When persons may make return after the assessor has made return for them.

Sec. 2752. When any person shall have been prevented from making or verifying a statement of property for taxation, by sickness or absence, and the assessor shall have made a statement for him, he may, at any time before the assessment of taxes thereon by the county auditor, make, verify, and file with the auditor the proper statement; but in such case before the auditor shall receive such statement the person making the same must add to the ordinary affidavit a statement to the effect that his failure to give to the assessor or verify such statement at the proper time was occasioned by his sickness or absence; and on the filing of such statement the auditor shall correct the statement made by the assessor. [56 v. 175, sec. 33.]

Sec. 2753. At the time of taking the lists of personal property the assessor shall also take a list of all real property which

Assessing realty and new structures not before assessed.

shall have become subject to taxation, and is not on the tax list, and affix a value thereto, according to the rules prescribed for district assessors in assessing real estate; and he shall also make and return a list of all new buildings or other structures of any kind of over one hundred dollars in value, the value of which shall not have been previously added to, or included in the valuation of the land on which such structures have been erected, specifying the tract or lot of land on which each of such structures has been erected, the kind of structure and the value which, in his opinion, has been added to such tract or lot by the erection thereof; and in case of the destruction by fire, flood, cyclone, storm or otherwise, of any structure of any kind, or of orchards, timber, ornamental trees or groves, over one hundred dollars in value, the value of which shall have been included in any former valuation of the tract or lot on which the same stood, the assessor shall determine as near as practicable how much less valuable such tract or lot is in consequence of such destruction, and make return thereof; and in case the assessor shall fail or neglect so to do, then the county or city board of equalization shall perform such duty, and the auditor shall deduct the same from the value thereof as it stands on the tax-list, and if said assessor shall ascertain that at the last decennial period or annual return, a mistake in the value of any improvement or betterment of any real property has occurred, or that the true value thereof has been omitted, then and in such case it shall be the duty of the assessor to return the correct value thereof, first giving notice of such action on his part to the owner or agent of his intention so to do, and such addition shall be a proper subject for the determination of the next annual board of equalization, upon the petition of the owner or agent of such property being filed for that purpose, and all additions made by the assessors as contemplated by this section, as well as all such as may be made under the provisions of section 2781, shall be placed upon the grand duplicate of the county, and placed in the hands of the county treasurer for collection, subject to be modified by the action of the next annual board of equalization. [56 v. 175, sec. 22; 83 v. 194.]

Structures, trees, etc., destroyed by fire, cyclones, etc.

Incorrect decennial valuation.

Additions.

Listing of dogs.

Sec. 2754. Every dog over three months of age shall be listed, either by the owner or by the assessor in the name of the owner, without affixing any valuation thereto; but

the owner may, if he so desire, affix any value thereto he wishes, without swearing to the valuation. Every person who keeps or harbors a dog or dogs, or who knowingly permits the keeping or harboring of a dog or dogs upon his or her premises, shall for the purpose of such listing and taxation be deemed the owner thereof; and the assessor shall ascertain the owner or harborer of every dog within his territory, and for this purpose may examine under oath any person or persons he may think proper. [74 v. 177, secs. 1, 2; 91 v. 145.]

Returns to be made by the assessor.

Sec. 2755. Each assessor shall, on or before the third Monday of May, annually, make out and deliver to the county auditor, in tabular form and alphabetical order, a list or lists of the names of the several persons, companies, or corporations, in whose names any personal property, moneys, credits, or investments shall have been listed, either by such persons, companies, or corporations, or by himself, placing separately, in appropriate columns, opposite each name, the aggregate value of the several species of property enumerated in section twenty-seven hundred and thirty-seven as listed, and the number of dogs, and when the value is given by the owner, such valuation, making separate lists of persons residing out of any incorporated town, and of persons who are residents of any incorporated town, or who are residents of any special or separate school district; the columns shall be accurately added up, and in every case in which any person whose duty it is to list any property for taxation, shall have refused or neglected to list the same when called on for that purpose, or to take and subscribe the oath in regard thereto, when required, the assessor shall enter opposite the name of such person, in an appropriate column, the words "refused to list," or "refused to swear," and in every case in which any person required to list property shall have been absent, or unable from sickness to list or swear, the assessor shall enter opposite the name of such person, in the proper column, the word "absent," or "sick." [74 v. 99, sec. 20.]

Assessor to return also the original statements properly arranged.

Sec. 2756. At the time of delivering the list named in the next preceding section, the assessor shall also deliver to the auditor all the statements of property which he shall have received from persons required to list the same, and also those prepared by himself, all arranged in alphabetical order; and

the auditor shall carefully preserve the same in his office for at least one year. [56 v. 175, sec. 21.]

Oath of assessor to returns.

Sec. 2757. The assessor, upon making return to the auditor of the lists and statements, shall take and subscribe an oath to the effect following, which may be administered by the auditor, or any official authorized to administer oaths:

I,——, assessor for——, in the county of——, do solemnly swear that the value of all personal property, moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, of which a statement has been made to me by the person required by law to list the same, is truly returned as set forth in such statement; that in every case where by law I have been required to ascertain the items and value of the personal property, moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, of any person, company or corporation, I have diligently, and by the best means in my power, endeavored to ascertain the same; and that, as I verily believe, a full list, with the value thereof estimated by the rules prescribed by law, is set forth in the annexed return; that in no case have I knowingly omitted to demand of any person, of whom by law I was required to make such demand, a statement of the description and value of personal property, of the amount of moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise which he was required to list or failed to indorse on any return made by me in cases in which the owner refused or neglected to list, or swear, the words "refused to list," or "refused to swear," or failed to swear as required by law, any party who purports to have been sworn as returned by me, or in any way connived at any violation or evasion of any of the requirements prescribed by law in relation to the listing or valuation of property, moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, of any kind for taxation, and that I have returned to the county auditor the original statements made to me, or which I have made, and also the statistics which by law I am required to procure and return. [56 v. 175, sec. 23; 88 v. 98.]

UNINCORPORATED BANKS AND BANKERS.

Who deemed bankers.

Sec. 2758. Every company, association, or person, not incorporated under any law of this state or of the United States,

for banking purposes, who shall keep an office or other place of business, and engage in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view to profit, shall be deemed a bank, banker, or bankers, within the meaning of this chapter. [64 v. 204, sec. 12.]

Statement by incorporated banks and bankers.

Sec. 2759. All unincorporated banks and bankers shall, annually, between the first and second Mondays of May, make out and return to the auditor of the proper county, under oath of the owner or principal officer or manager thereof, a statement setting forth:

First—The average amount of notes and bills receivable, discounted or purchased in the course of business, by such unincorporated bank, banker or bankers, and considered good and collectible.

Second—The average amount of accounts receivable.

Third—The average amount of cash and cash items in possession or in transit.

Fourth—The average amount of all kinds of stocks, bonds, including United States government bonds, or evidences of indebtedness, held as an investment, or in any way representing assets.

Fifth—The amount of real estate at its assessed value.

Sixth—The average amount of all deposits.

Seventh—The average amount of accounts payable, exclusive of current deposit accounts.

Eighth—The average amount of United States government and other securities that are exempt from taxation.

Ninth—The true value in money of all furniture and other property not otherwise herein enumerated. From the aggregate sum of the first five items above enumerated the said auditor shall deduct the aggregate sum of the fifth, sixth, seventh, and such portions of the eighth items as are by law exempt from taxation, and the remainder thus obtained added to the amount of item nine, shall be entered upon the duplicate of the county in the name of such bank, banker or bankers, and taxes thereon shall be assessed and paid the same as provided for other personal property assessed and taxed in the same city, ward, or township. [64 v. 204, sec. 10; 79 v. 109.]

Deduction by county auditor.

Sec. 2759a. The said bank, banker or bankers shall at the

Further statement required.

same time make statement under oath of the amount of capital paid in or employed in such banking business, together with the number of shares or proportional interest each shareholder or partner has in such association or partnership. [79 v. 109.]

Incorporated savings banks.

Sec. 2759b. That the provisions of section 2759 shall apply to and govern savings banks incorporated under the act of April 16, 1867. [87 v. 215.]

How averages obtained.

Sec. 2760. The averages provided for in the preceding section shall be obtained by adding together the amounts of each item above specified, owned by or standing on the books of such bank, banker, or bankers, on the first Monday of each month of the year preceding the Monday of May in which the return is made, and dividing the same by the number of months in the year: provided, that in cases where such bank, banker, or bankers commenced business during the preceding year, the division shall be made by the number of months elapsed after the commencement of such business. [64 v. 204, sec. 11.]

Persons commencing the business of banking after the day preceding the second Monday of April: how to be listed.

Sec. 2761. When any person, persons, company, or association unincorporated, shall commence or engage in the business of banking, after the day preceding the second Monday in April, in any year, the average value of whose personal property intended to be employed in such business shall not have been previously entered on the assessor's list for taxation, in said county, such person, persons, company, or association shall report to the auditor of the county the probable average value of the personal property by him or them intended to be employed in such business until the day preceding the second Monday in April thereafter, and shall pay into the treasury of such county a sum which shall bear the same proportion to the levy for all purposes, on the average value so employed, as the time from the day on which he or they shall commence or engage in such business as aforesaid, to the day preceding the second Monday in April next succeeding, shall bear to one year. [56 v. 175, sec. 14.]

INCORPORATED BANKS.

Shares to be listed.

Sec. 2762 All the shares of the stockholders in any incorporated bank or banking association, located in this state, whether now or hereafter incorporated or organized under the laws of this state or of the United States, shall be listed at

their true value in money, and taxed in the city, ward, or village where such bank is located, and not elsewhere. [64 v. 204, sec. 1.]

Tax on real estate.

Sec. 2763. The real estate of any such bank or banking association shall be taxed in the place where the same may be located, the same as the real estate of individuals. [64 v. 204, sec. 2.]

Names of stockholders and number of shares held by each.

Sec. 2764. There shall at all times be kept in the office where the business of such bank or banking association is transacted, a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which shall be at all times during business hours open to the inspection of all officers who are or may be authorized to list or assess the value of such shares for taxation. [64 v. 204, sec. 3.]

Return to be made by cashier to the auditor.

Sec. 2765. The cashier of each incorporated bank shall make out and return to the auditor of the county in which it is located, between the first and second Monday of May, annually, a report in duplicate, under oath, exhibiting, in detail, and under appropriate heads, the resources and liabilities of such bank, at the close of business on the Wednesday next preceding said second Monday, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share. [74 v. 88, sec. 1.]

Auditor to assess the value of shares and submit the same, with the bank return, to the county board of equalization.

Sec. 2766. Upon receiving such report the auditor shall fix the total value of the shares of such bank according to their true value in money, and deduct from the aggregate sum so found the value of the real estate included in said statement of resources as the same stands on the duplicate; and thereupon he shall make out and transmit to the annual county board of equalization a copy of the report so made by the cashier, together with the valuation of such shares as so fixed by the auditor. [64 v. 204, sec. 5; 74 v. 88, sec. 2.]

Sec. 2767. [Repealed April 13, 1880; 77 v. 191.]

Sec. 2768. [Repealed April 13, 1880; 77 v. 191.]

Proceedings when bank fails to make returns.

Sec. 2769. If any bank shall fail to make out and furnish to the county auditor the statement required, within the time herein fixed, it shall be the duty of said auditor to examine the books of said bank; also, to examine any officer or agent thereof under oath, together with such other persons as he may

deem proper, and make out the statement. Any bank officer failing to make out and furnish to the county auditor the statement, or willfully making a false statement, as required in section twenty-seven hundred and sixty-five, shall be liable to a fine not exceeding one hundred dollars, together with costs and other expenses incurred by the auditor or other proper officer in obtaining such statement aforesaid; and said auditor shall have the same powers, and the probate judge of the county shall exercise the same powers, and perform the same duties in aid of the auditor in the performance of his duties under this section, as are authorized by law in cases where the county auditor is informed, or has reason to believe, that any party has failed to make any return, or has made a false return for taxation; and the statement so made out by the auditor shall in all respects stand as the statement required to be made by the cashier. [64 v. 204, sec. 9.]

RAILROAD COMPANIES.

Board of appraisers for railroad company.

Sec. 2770. The county auditors of the several counties in this state in which any railroad company now has, or hereafter may have, its track and roadway, or any part thereof, shall constitute a board of appraisers and assessors for such railroad company; any railroad company having its road, or any part thereof, in one county only, the auditor of such county shall constitute such board. [59 v. 88, sec. 1.]

President of board of appraisers for railroad company.

Sec. 2771. The auditor of the county where such railroad company has its principal office, if such principal office is in this state, and if such principal office is not in this state, then the auditor of the county having the largest city or village upon the line of such road shall be the president of said board, whose duty it shall be to appoint the time and place for the meeting of such board, and notify the proper county auditors of the same, at least five days before the time appointed for such meeting. In the absence or inability of the president, the board shall appoint one of its members president pro tempore. In all meetings of any such board, a majority of such county auditors shall constitute a quorum, and a majority of those present at any meeting having a quorum shall decide all questions submitted. Each board shall appoint one of its number secretary, and full minutes of its proceedings shall be kept, which shall consist of a full

Quorum.

Secretary.

and complete record of the votes of each member of said board. The valuation of the property shall be fixed only on motion made and duly seconded. On all such motions the yeas and nays shall be called, and each member's vote shall be recorded by the secretary. Immediately after the board has adjourned, the secretary shall make a complete record of all the transactions of the proceedings of the board, and set forth therein the names and official capacity of the officials of the railroad present at such meeting. And a certified copy of such proceedings, signed by the president and secretary thereof, shall be forwarded at once to the county auditor of each county constituting a member of said board, and the same shall be recorded in a book kept in the county auditor's office, subject to the inspection of any person during office hours, and the certified copy shall alike be kept on file in said county auditor's office, and for like examination. [59 v. 88, sec. 2; 88 v. 417.]

Board of valuation of railroad to meet annually, in May.

Sec. 2772. It shall be the duty of each board to meet in the month of May, in the present and each succeeding year, at such time as the president thereof may appoint; and if no meeting be appointed by him before the second Tuesday in May, the several county auditors shall meet on that day, in the place where the proper railroad for which said auditors constitute the board, as aforesaid, has its principal office, or in the principal city or village upon the line of such road, as the case may be, and proceed to ascertain all the personal property, which shall be held to include road bed, water and wood stations, and such other realty as is necessary to the daily running operations of the road, moneys, and credits of such company, and the undivided profits, reserved or contingent fund of said company, whether the same may be in moneys, credits, or in any manner invested, and the actual value thereof in money; and also locomotives and cars not belonging to the company, but hired for its use or run under its control on its road by a sleeping car company or other company; but as to such rolling stock not belonging to it, but under its control, the railroad company may return the same separate from its own property, and if so returned, the board shall fix the valuation of such property separated, but include the amount in the aggregate valuation. Such boards shall have power to require from the president, secretary, treasurer, receiver, and

Duties of the board.

principal accounting officer of such road, a detailed statement, under oath, of all items and particulars constituting such property, moneys, and credits, and the value thereof, and may examine the books and papers of such road, and any or all of its officers, receivers, servants, or agents, under oath, touching any matter relating to the same. Any county auditor present at such meeting is authorized and empowered to administer such oath. It shall be the duty of said board of appraisers and assessors to report annually, on or before the first Monday in the month of June, to the auditor of state, the amount assessed upon each railroad company, specifying the total sum, and amount distributed to each county; which shall be by the auditor of state communicated to the general assembly, with his annual report, in tabular form. [64 v. 114, sec. 3.]

Penalty for officers, etc., refusing to comply with requirements of board.

Sec. 2773. Any president, secretary, receiver, accounting officer, servant, or agent, of any railroad company having any portion of its road-way in this state, who shall refuse to attend before the proper board of appraisers and assessors when required so to do, or refuse to submit to the inspection of said board any books or papers of such railroad company in his possession, custody, or control, or shall refuse to answer such questions as may be put to him by said board or its order, touching the business, property, moneys, and credits, and the values thereof, of said railroad company, shall be guilty of a misdemeanor, and, on conviction thereof, before any court of competent jurisdiction, shall be confined in the jail of the county not exceeding thirty days, and be fined in any sum not exceeding five hundred dollars and costs; and any president, secretary, receiver, accounting officer, servant, or agent, as aforesaid, so refusing, as aforesaid, shall be deemed guilty of contempt of such board, and may be confined by order of said board in the jail of the proper county until he shall comply with such order, and pay the costs of his imprisonment. [59 v. 88, sec. 4.]

Contempt of board: punishment.

Apportionment of valuation of railway property.

Sec. 2774. The value of such property, moneys and credits of any railroad company, as found and determined by such board, shall be apportioned by said board among the several counties through which such road, or any part thereof, runs, so that to each county and to each city, village, township and district, or part thereof therein, shall be apportioned such part thereof as shall equalize the relative value of the real

estate, structures and stationary personal property of such company therein, in proportion to the whole value of the real estate, structures and stationary personal property of such railroad company in this state; and so that the rolling stock, main track, road bed, supplies, moneys and credits of such company shall be apportioned in the same proportion that the length of such road in said county bears to the entire length thereof in all said counties or county, and to each city, village and district, or any part thereof therein; provided, that if the line of any railroad company is divided into separate divisions or branches, so much of the rolling stock of such company as belongs to or is used solely upon any one of such divisions or branches shall be apportioned in the same manner to the county or counties, and to each city, village and district, or any part thereof therein through which such branch or division runs; and the board shall certify to the county auditor of each county, and to each city, incorporated village, township and district, or any part thereof therein interested, the amount apportioned to his county, and the board shall make and forward a like certificate, together with all the reports of the various railroad officers, and other papers and evidence which formed the basis of their valuation, to the auditor of state, for the use of the state board of equalization of railroad property. It shall be the duty of the county auditor, upon receiving the certificate aforesaid, to apportion the amount therein stated to the cities, villages, townships, districts, or parts thereof; but the auditor shall not put the same on the tax-list until he shall have been advised of the action of said state authority, when the proper amounts shall be entered on the tax-lists. [59 v. 88, sec. 5; 611 v. 58, sec. 1; 82 v. 160.]

Compensation of members of the board.

Sec. 2775. Each county auditor shall be paid from the treasury of his county the sum of three dollars for each day's attendance as a member of any board aforesaid under this chapter, and five cents a mile going to and returning from its place of meeting. [59 v. 88, sec. 7.]

How portion of value for this state found when part of road in another.

Sec. 2776. When any railroad company has part of its road in this state and part thereof in any other state or states, the proper board shall take the value of such property, moneys, and credits of such company so found and determined, as aforesaid, and divide it in the proportion the length of such road in this state bears to the whole length of such road, and

determine the principal sum for the value of such road in this state accordingly, equalizing the relative value thereof in this state, as above provided. [59 v. 88, sec. 8.]

AN ACT,

Providing for an Excise Tax on Express Companies.

91 Ohio Laws, 237.

Express companies defined.

Sec. 1. Be it enacted by the General Assembly of the State of Ohio, That any person or persons, joint-stock association or corporation, wherever organized or incorporated, engaged in the business of conveying to, from or through this state, or any part thereof, money, packages, gold, silver, plate or other article, by express, not including the ordinary lines of transportation of merchandise and property in this state, shall be deemed to be an express company.

Annual statement to auditor of state.

Sec. 2. Every express company defined in section one hereof doing business in this state shall, annually, between the first and thirty-first day of May, under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state of such association or corporation, if an association or corporation, make and file with the auditor of state a statement, in such form as the auditor of state may prescribe, containing the following facts:

First. The name of the company.

Second. The nature of the company, whether a person or persons, or association or corporation, and under the laws of what state or country organized.

Third. The location of its principal office.

Fourth. The name and post-office address of the president, secretary, auditor, treasurer, and superintendent or general manager.

Fifth. The name and post-office address of the chief officer or managing agent of the company in Ohio.

Sixth. The entire receipts (including all sums earned or charged, whether actually received or not) for business done within this state of each agent of such company doing business in this state (giving the name of the office and agent, and the amount received by him), for the year then next preceding the first day of May, for and on account of such company, including its proportion of gross receipts for business done by such company within this state in connection with other companies; also, the total amount of such receipts for business done within this state.

Seventh. An itemized statement of the amounts actually paid by such express company, for the year then next preceding the first day of May, to the railroads within this state, for the transportation of its freight within this state, showing the amount paid to each railroad company.

Eighth. The entire receipts of the company for business done wthin Ohio, as defined in item six, after deducting the amounts paid for transportation of freight, as defined in item seven.

Ninth. Such other facts and information as the auditor of state may require in the form of return prescribed by him.

Blanks for making the above statement shall be prepared and, on application, furnished any express company by the auditor of state.

Sec. 3. Relates to the failure or refusal of any express company to make the statement prescribed by section two.

Sec. 4. The auditor of state, treasurer of state, and attorney-general, shall constitute a board named the state board of appraisers and assessors, of which board the auditor of state shall be ex officio president. In the absence or inability of the auditor, the board shall appoint one of its members president pro tempore. The board shall appoint a secretary, and full minutes of its proceedings shall be kept. The board shall, annually, on the first Monday in June, meet in the office of the auditor of state, and thereupon, or when received, the auditor of state shall lay before the board the statements and schedules returned to him under sections two and three hereof. The board shall proceed to ascertain and determine, on or before the second Monday in July, the entire receipts of express companies for business done within Ohio, as defined in item six of section two hereof, after deducting the sums paid for transportation of freight, as defined in item seven of section two hereof, and the amounts thus ascertained by said board shall, in each instance, be held and deemed to be "the gross receipts of such express company for busness done within Ohio," for the year under consideration. The board may adjourn from time to time, etc.

Sec. 5. Provides penalties for failure to file a statement under the provisions of section two.

Sec. 6. The state board of appraisers and assessors shall, on the first Monday in August, report to the auditor of state

Collection and disposition of excise tax on express companies.

the amount of the gross receipts of express companies for business done within the state of Ohio for the year next preceding the first day of May; at the same time, the board shall file with the auditor of state the statements of the various companies and other papers before it. It shall be the duty of the auditor of state, in the month of November, annually, to charge and collect from each express company doing business in this state, a sum, in the nature of an excise tax, to be computed by taking two per cent. of the amount fixed by the state board of appraisers and assessors as the gross receipts of such company for business done within the state of Ohio for the year next preceding the first day of May, and certified to the auditor of state; provided, nothing contained in this act shall exempt or release express companies from the assessment and taxation of their tangible property in the manner authorized and provided by law. All taxes collected by the auditor of state under the provisions of this act, shall be paid into the state treasury, and be credited to the general revenue fund. If any express company fails or refuses to pay said tax during the month of November, the auditor of state shall add to the tax due, a penalty of fifty per cent. thereon, and shall forthwith proceed to collect the tax and penalty by means provided by law for the collection of taxes by county treasurers, and for his services shall be allowed five per cent. on the penalty collected, which he is authorized to retain. It shall be the duty of the attorney-general, or any prosecuting attorney, on the request of the auditor of state, to prosecute any proceeding for the collection of such tax, which officer shall be allowed, for his services, five per cent. on the total amount collected, to be retained and paid to him by the auditor of state. The balance of the amount shall be paid into the state treasury. Suit for the collection of such tax may be brought into the name of the state in the county of Franklin, or in any county in which such express company is doing business.

Sec. 7. This act shall take effect and be in force from and after its passage.

Passed May 14, 1894.

OPINION OF JUDGE TAFT. Filed in the Circuit Court, March 14, 1894, in No. 337 (Adams Express Company's Case for 1893). No. 352 (Telegraph case for 1893), and Cases of American, United States and National Express Companies for 1893 (subsequently dismissed for want of jurisdiction, and not appealed to this Court).

TAFT, Circuit Judge.

These are five suits in equity in which the Western Union Telegraph Company, the Adams Express Company, the American Express Company, the United States Express Company, and the National Express Company, are the respective complainants, while the Auditor, Treasurer and Attorney-General are defendants in all the suits. The object of each bill is to enjoin the defendants as a state board of appraisers from certifying to the auditors of the various counties of the state an assessed valuation for taxation of the property of the complainant in the state of Ohio, determined and distributed by the board, under and by virtue of an act of the legislature of Ohio, passed April 27, 1893, providing a mode of taxing express, telegraph and telephone companies.

The complainants are all corporations, joint-stock companies or partnerships, organized under the laws of other states than Ohio, and the jurisdiction of the court is invoked on the ground of the diverse citizenship of the parties. The bills aver that the law under which the assessment has been made is in violation of the constitution of the United States, and of the constitution of Ohio, and ask equitable relief on the ground that it is necessary to avoid a multiplicity of suits. Restraining orders were granted by Judge Sage on the filing of the bills, and the causes now come on for hearing upon motions for preliminary injunctions. Demurrers have been filed to the bills, and all the issues thus presented have been argued together.

The law in question was passed April 27th, 1893, and amends sections 2777, 2778, 2779 and 2780 of the Revised Statutes of Ohio, so that they read as follows:

Section 2777 provides: Any person or persons, joint-stock association or corporation, wherever incorporated, engaged in the business of conveying to, from or through this state, or any part thereof, money, packages, gold, silver, plate, or other article, by express, not including the ordinary lines of transportation of merchandise and property in this state, shall be deemed to be an express company; any person or persons, joint-stock association or corporation, wherever incorporated, engaged in the business of transmitting to, from, through, or in this state, telegraphic messages, shall be held to be a telegraph company; any person or persons, joint-stock association or corporation, wherever incorporated, engaged in the business of transmitting to, from, through or in the state, telephonic messages, shall be held to be a telephone company.

Section 2778 provides: That the treasurer, attorney-general, and auditor of state, shall constitute a board of appraisers and assessors for such express, telegraph, and telephone companies. That it shall be the duty of such board to meet in the month of May in the present and each succeeding year, at such time as the president thereof shall appoint. That said board shall proceed to ascertain the entire amount and value of the personal and real property of said express, telegraph and telephone companies. That such board shall have power to require of all the officers of said companies a detailed statement under oath of all the particulars concerning their property, moneys, credits, and the value thereof, and may examine their books and papers and their officers, touching any matter relating to the same; that it shall be the duty of the board to report annually on or before the first Monday in the month of June to the auditor of state, the total value of the property of said companies, and the value assessed against said companies for their property in the state of Ohio and in the distribution of the same between the counties, and that the company shall be subject to all the provisions and penalties imposed upon persons who refuse to give information to county auditors, under sections 2781 to 2785 inclusive, of the Revised Statutes.

Section 2778a provides: Every express, telegraph, and telephone company embraced in section 2777, whether chartered by the laws of this state, or any other state, or country doing business in this state, shall annually, between the first

and tenth days of May, return to the auditor of state, under the oath of its treasurer, the amount of its capital stock, its place of business, the par value and market value (or if there be no market value then the actual value) of its shares at the time of its return. The return shall also contain a statement in detail of the entire real and personal property of said companies, and where located, and the value thereof as assessed for taxation; and telegraph and telephone companies shall, in addition thereto, return the whole length of their lines, and the length of so much of their lines as is without and is within the state of Ohio, which lines shall include what said telegraph or telephone companies control under lease or otherwise; and said board of appraisers and assessors shall in determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio, in the proportion which the same bears to the entire property of said corporation, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid.

Express companies shall, in making said return, include therein as a part thereof, a statement of their entire gross receipts for the year ending the first of May, of the business done within the state of Ohio, giving the receipts of each office in said state, and the location thereof for said year.

Section 2779 provides: That the value of such property, moneys and credits of any telegraph or telephone company, as found and determined by such board, shall be apportioned by said board among the several counties through which the lines of telegraph or telephone company, or any part thereof run, so that to each county, city, village, township and district, or part thereof therein, shall be apportioned such part thereof as shall equalize the relative value of the entire property of such company therein, in proportion to the whole value of the entire property of said company, and in the proportion that the length thereof in all such counties, cities, villages, townships and districts, or any part thereof therein, and the board shall certify to the county auditor of

each county, and to each city, incorporated village, township or district, or any part thereof therein, the amount proportioned to his county, and shall forward a like certificate to the auditor of state. It is the duty of the county auditor, upon receiving the certificate, to apportion the amount among the various cities, villages, townships and districts, and to put the same on the tax list to be assessed, and the taxes thereon shall be collected in the same manner as taxes assessed and collected on other personal property, and the rate is to be the same as that assessed against real or personal property in said cities, villages, townships and districts.

Section 2780 provides: That the value of the property, moneys and credits of any express company, as determined by the board, shall be apportioned among the several counties in which the express companies do business, in proportion of the gross receipts, instead of according to the length of line as in the case of the telegraph or telephone companies.

Affidavits have been filed by defendants showing how the board of appraisers proceeded under this law.

Defendants in support of their demurrer contend that the bills are prematurely filed. Section 5848 of the Revised Statutes of Ohio provides that suits may be brought to enjoin the illegal levy and collection of taxes and assessments. Section 5849 provides that actions to enjoin the illegal levy of taxes and assessment must be brought against the corporation or person for whose use and benefit the levy is made, and if the levy would go on the tax duplicate of the county, the county auditor must be joined. These actions give the right to relief by injunction on the sole ground that the tax is illegal, enlarging in this respect the ordinary equitable jurisdiction to enjoin the levy or collection of taxes.

Nevertheless the remedy thus afforded will be enforced in federal courts of equity (Cummings vs. National Bank, 101 U. S. 153), but, of course, its extent is limited by the Statute which gives its existence. Now it is obvious from sec. 5849, that the only persons against whom such an action can be brought to prevent the levy of a tax are the corporation or person beneficially interested in the proceeds of the tax, and the auditor who takes the final step in completing the levy by placing it on the duplicate. Jones vs. Davis, 35 O. S. 474. These bills are not filed against either the corporations for whose use the tax will be collected, or against the county audi-

tors. The bill can not be sustained, therefore, on the special remedy afforded by the sections of the Ohio Statutes above quoted.

Can they be sustained on the general equitable jurisdiction of the court? It is well settled that the mere illegality of a tax is no ground for invoking equitable relief. Shelton vs. Platt, 139 U. S. 591-599. But we have set up in the bills a ground upon which courts of equity frequently grant relief, and that is to avoid a multiplicity of suits. If the amounts assessed by the board are certified to the various county auditors, each complainant will be required to bring suit to recover the money collected in from fifty to seventy counties of the state, and the burden of the litigation will be oppressive. This is ample reason why a court of equity should afford relief if otherwise complainants are entitled to it. Cummings vs. National Bank, 101 U. S. 153-157; State Railroad Tax Cases, 92 U. S. 575, 618; Pacific Express Company vs. Seibert, 142 U. S. 339-348; Shelton vs. Platt, 139 U. S. 591-599.

Defendants further object that there is no equity in the bills because all the complainants but one show in their bills that they own property in Ohio subject to taxation, but do not aver that they have paid or tendered the same which in accordance with their contention is due for taxes. To this it is replied that the property has not been regularly assessed for taxation under the general laws, and no officer has been given authority to receive any tax thereon by lawful levy. Moreover, it is suggested that in some counties the assessment under the general law might be larger than under the law which is here in question. It is well settled that in actions of this character the complainant must show that he has done equity by paying what he admits to be due before he can obtain any equitable relief against that part of the tax which he claims is illegal. State Railroad Tax Cases, 92 U. S. 575, 613 et seq.; National Bank vs. Kimball, 103 U. S. 732-733; Albuquerque Bank vs. Perea, 147 U. S. 87-90; Frazier vs. Seibern, 16 O. S. 614-624. Nor do I think that any sufficient reason is given why the rule should not apply in this case. Each complainant knows how much property it has in each county, and it knows what the general rate of taxation is in each county, so that it can easily determine what amount of tax is due from it in each county if the law in question is invalid and the general laws apply. If the treasurers of the counties re-

fuse to receive the money, well and good. The complainants will then have done all they could and a tender is equivalent to payment. But until this is done, the complainants can not fall back on the assumption that their money when tendered will not be received. The other suggestion as to possible overpayments in some counties has no foundation in any averment of the bill, or any statement of affidavit, and needs no consideration. For the want of an averment of payment or tender of the taxes appearing upon the face of the bills to be due, the motions must be overruled and the demurrers sustained.

In a brief filed some time after the hearing, complainant's counsel stated that if it was required, they would estimate and tender the taxes due under the general tax laws upon the property held by them. Upon their paying all the costs in this case, thus far incurred, I will allow the restraining order already issued to stand for one week from to-day, to enable them to make the necessary tenders or payments, and to file amended bills averring such payments or tenders, or the restraining orders will then stand dissolved. On Monday next if such bills are filed, I will hear motions for preliminary injunctions, and if defendants see fit to refile their demurrers, I will hear them at the same time.

It is due to counsel to say that I have examined, with much care, the questions heretofore argued as to the validity of the Nichols law under the state and federal constitutions, and have committed my views to writing. I intended to read them this morning, but further consideration makes me hesitate as to their correctness. I take advantage of the opportunity presented by the defects in the bills already mentiond, to make a ruling which only postpones the controversy on the merits, and enables me to invite a re-argument on the main questions at issue. I do not care to hear counsel again on the question whether the creation of a tribunal to assess the property of telegraph or express companies different from that charged with the duty of assessing the property of individuals, is a departure from the uniformity enjoined by the state constitution, I am satisfied that it is not. Nor do I care to hear counsel on the question whether the companies are denied by this law a right to be heard so that there is a taking of property without due process of law in violation of the federal constitu-

tion, for I think they have ample opportunity to be heard by written statement and oral argument if necessary. Nor do I think there is any weight to be given to the objection that by classification of companies under this law there is any denial to the complainants of the equal protection of the laws within the inhibition of the 14th amendment to the federal constitution, if such classification is permitted by the state constitution.

With these exceptions I should like to hear the question of the validity of the law under both constitutions re-argued.

In the discussion, I should like to hear a construction of the clause in section 2778a, in which a guide is furnished, or is attempted to be furnished to the appraisers for assessing the property. It is redundant and somewhat obscure. It is essential that a clear idea of its meaning be had before the questions in this case can be settled. Is it or not so uncertain in its rules for assessment, especially with regard to express companies, as not to constitute a uniform rule of taxation?

Another question is whether under the law of Ohio the capital stock of a corporation is identical with all its property and things of value, so that a law is not void for want of uniformity which assesses certain corporations on their capital stock, and others on their property?

Another question is whether or not there is included in the assessment against the express companies an assessment upon the contracts of such companies with railroad companies, and if so, whether or not this is a tax on inter-state commerce in so far as those contracts are for inter-state commerce? If in order to sustain the law under the constitution of Ohio it must be construed to be a tax upon a business, then is it or not a tax upon an inter-state commerce business, and in violation of the federal constitution?

I merely throw out these questions not to limit the discussion on the main controversies under the constitution of Ohio, and that of the United States, but to give counsel an idea of the difficulties I have found in my own mind in reaching a satisfactory conclusion, with the hope that I may be enlightened in a re-argument.

OPINION OF JUDGE TAFT.

Filed in Circuit Court, April 23, 1894, in No. 352 (Telegraph Case for 1893).

The Western Union Telegraph Company vs. Ebenezer W. Poe, Auditor of the State of Ohio, John K. Richards, Attorney-General of the State of Ohio, and Wm. T. Cope, Treasurer of Ohio. Reported in 61 Fed. Rep. 449.

This is a suit in equity to enjoin the assessment of a tax, brought by the Western Union Telegraph Company, a corporation and citizen of New York, against the state auditor, attorney-general and state treasurer of Ohio. It now comes on for hearing on demurrer to the bill, and on a motion by complainant for preliminary injunction.

The main questions at issue are of the validity, under the federal and Ohio constitution, of a law of Ohio known as the Nichols Law, imposing taxes on telegraph, telephone and express companies. The bill avers that the complainant owns and operates lines of telegraph in nearly all of the states of the Union, including Ohio, said lines consisting of poles with cross-arms, supporting suitable wires, for the transmission of telegraphic messages by means of electricity, and employs thousands of men as officers and operators, clerks and messengers, together with line repairers and others; that on April 27, 1893, the legislature of Ohio passed a law for the taxation of telegraph, telephone and express companies, which made defendants a board of tax appraisers for such companies and directed them to value and assess the property of such companies as follows:

Sec. 2778a. Every express, telegraph and telephone company embraced in section 2777, whether chartered by the laws of this state, or any other state or county, doing business in this state, shall annually, between the first and tenth days of May, return to the auditor of state, under the oath of its treasurer, the amount of its capital stock, its place of business, the par value and market value (or if there be no market value, then the actual value) of its shares at the time of said return. The return shall also contain a statement in detail of the entire real and personal property of said companies and where located and the value thereof as assessed for taxation; and telegraph and telephone companies shall, in addition thereto, return the whole length of their lines and the length

of so much of their lines as is without and is within the state of Ohio, which lines shall include what said telegraph and telephone companies control and use, under lease or otherwise; and said board of appraisers and assessors shall in determining the value of the property of said companies, in this state, to be taxed within the state and assessed as herein provided, be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio in the proportion which the same bears to the entire property of said corporation, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid. Express companies shall in making said return, include therein as a part thereof a statement of their entire gross receipts for the year ending the first day of May, of the business done within the state of Ohio; giving the receipts of each office in said state and the location thereof for said year.

The bill further avers that complainant made a statement to the auditor, a copy of which is filed with the bill, showing the amount of its capital stock, and the market value thereof, so far as said market value could be shown, together with a statement of the location and value of its property in the state of Ohio, the number of miles of its telegraph lines in Ohio, and the total length of its lines everywhere. That, acting upon the information thus furnished, and under the requirements of the statute, and not in the exercise of their individual judgment of the valuation of the property of complainant, defendants made an appraisement and assessment against complainant of $2,011,000.00, wrongfully pretending that the sum named is the value of complainant's property in Ohio; that unless restrained by this court, the defendants as such board will certify this assessment in accordance with the act, to the auditors of eighty-seven counties in the state, wherein complainant's lines run, in the proportion of the mileage of lines in each county to the state mileage; that said auditors will on receipt thereof certify the same to the respective county treasurers for collection. That the rate of taxation in Ohio for the year 1893 varies according to the county from 2¼ to 3 per cent. so that the aggregate assessment against complainant upon said illegal and excessive valuation will amount

to between $50,000 and $60,000, and in several counties of the state not only the assessment but the difference between the assesment under said law, and an assessment upon a true and lawful valuation of complainant's property will exceed $2,000.00; that in truth, the entire value of complainant's property in Ohio at all times in the year 1893, prior to and subsequent to May 1, 1893, does not exceed $647,000.00, and, estimated as all other property is estimated for taxation in the state, would fall far below that sum; that complainant is the owner of lines of Atlantic cable extending to Cuba and England, and connecting in England with lines of other companies extending to all parts of Europe, and also of lines in Canada; that the total mileage of its lines is 189,576 miles including the mileage in Ohio which is 8,272 miles; that the cash value of complainant's property can not be ascertained approximately by applying the proportion which its lines in Ohio bear to the whole number of miles of its lines, upon a valuation of all the shares of its capital stock, because such a valuation includes elements of value not existing in Ohio and not taxable within said state, and some of which are not taxable at all, and also because the lines are not of uniform value per mile either as to gross or net income earned upon the various lines or as to cost of construction and maintenance; that included in the total mileage are thousands of miles of ocean cable costing $4,000 per mile, while the lines per mile in Ohio cost but $103.60 per mile; that the income per mile in many states is much greater than in Ohio, and that the average income per mile in the entire system is much greater than of the lines in Ohio; that the market price of complainant's stock affords no fair or reasonable or just method of forming an opinion as to the value of its property, or of fixing a basis of value for the taxation thereof because it is speculative and variable, dependent on conditions having no relation to complainant's business or property; that the actual value of complainant's shares is made up of property of various kinds in various states, of valuable contracts with railroad companies and other companies and individuals, of franchises conferred by Act of congress of July 24, 1866 (14 Stat. 221), of franchises granted by other states and municipalities in them, and by foreign governments, of business experience, good will and skill employed in the prosecution of its business, of investments in bonds and stocks of other corporations ag-

gregating $7,633,230.12, and real estate out of Ohio worth more than $5,000,000.00; that the tax proposed to be levied under the assessment sought to be enjoined would amount to thirty per centum of its earnings in Ohio from all its business in Ohio, including interstate commerce, an unheard of rate of taxation, and substantially destructive of its business in said state. That the complainant's property in Ohio is of the simplest character, consisting only of poles, wires, office furniture and instruments used in telegraphy.

The bill avers that the law is void because it does not require the valuation of the property of complainant and other companies according to its true value in money, as the property of all other corporations and individuals is valued for taxation and as all property is required to be valued for taxation under the state constitution in Ohio, but directs a valuation according to the opinion of the board of appraisers as to the value of the capital stock of such companies, which is determined by the diligence, fidelity and skill with which the business of said companies is conducted, by its good will, and by the property of said companies in many states and by the general financial conditions existing in the country. "To the end, therefore, that the complainant may not be subjected to a multiplicity of suits which would otherwise be brought against it for the recovery of said assessment, to-wit: suits in eighty-seven counties in which it does business in Ohio," a provisional injunction restraining defendants from certifying the said assessment to the various county auditors in which complainant does business, and after final hearing, a perpetual injunction are prayed for.

Upon the filing of the bill, Judge Sage granted a temporary restraining order until a motion for a preliminary injunction could be made, heard and disposed of. Defendants thereafter interposed a general demurrer to the bill. The motion and the demurrer came on for hearing. The court decided that the bill was defective in that it admitted certain taxes to be due without any averment that they had been paid; but allowed complainant a week in which to pay them and to file an amendment showing such payment. The amendment was filed. A re-argument was ordered on the merits. The minutes of the board which accompanied the affidavit showed its findings and final action with reference to complainant as follows:

"That on the first day of May, 1893, the amount of the

capital stock of said corporation, issued and outstanding was $94,000,820.00. The par value of its shares was $100.00 each, and the market value of its shares on said day was $87.00 each. That the value of the entire capital stock of the company on said day was 940,008 1-5 shares at $87 a share, or $81,780,713.40. That there should be deducted from the value of the capital stock so found ($81,780,713.40) the value of the investments of the company in bonds and stocks of other corporations being $7,633,230.12, and the value of the real estate owned by it outside of Ohio, being $5,013,326.64, making altogether $13,646,556.76, leaving $69,134,156.34, being the value of the entire capital stock of the company as based upon and represented by the lines of the company. That the whole length in miles of said company, both within and without the state of Ohio, was on the said day, 189,576 miles, and the length of such lines in the state of Ohio was 8,272 miles. That the proportion of the entire value of the capital stock of said company employed in business in Ohio, and represented by property taxable therein, was on said first of May, 1893, 8272-189576 of $69,134,156.64 which equals $3,016,614.67. On consideration of the foregoing, the fact that property generally in Ohio is taxed at not more than two thirds of its actual value, the statement in the return of the company that to reproduce the lines in this state will cost the sum of $1,649,279.10 (which the board regards as an insufficient estimate, and at any rate much below the existing value of said lines as an entirety, and other facts and evidence contained in the return of the company, and otherwise brought to the attention of the board, on motion the board unanimously fix and determine the value of the property of the Western Union Telegraph Company, in the state of Ohio, to be assessed and taxed therein, at the sum of $2,011,076.45."

An affidavit of the state auditor was filed showing that in no one county in the state would the tax to be collected from the Western Union under this assessment equal $2,000, and that the difference between the tax assessed and the tax admitted to be was much less than that sum.

Brown & Wells, and Ramsey, Maxwell & Ramsey, for complainant; J. K. Richards, attorney-general, and Thos. McDougall, for respondents.

Taft, circuit judge, after stating the case as above, delivered the opinion of the court.

The first question for consideration is, whether this court has any jurisdiction as a federal court in equity to grant the relief prayed in the bill. Section 5848 of the Revised Statutes of Ohio provides that suits may be brought to enjoin the illegal levy and collection of taxes and assessments. Section 5849 provides that actions to enjoin the illegal levy of taxes and assessments must be brought against the corporation and person for whose use or benefit the levy is made, and if the levy would go on the tax duplicate of the county, the county auditor must be enjoined. These actions give the right to relief by injunction on the sole ground that the tax is illegal, enlarging in this respect the ordinary equitable jurisdiction to enjoin the levy or collection of taxes. The remedy thus afforded will be enforced in federal courts of equity (Cummings vs. National Bank, 101 U. S. 153) but, of course, its extent is limited by the statute which gives its existence. Now it is obvious from section 5849 that the only persons against whom such an action can be brought to prevent the levy of a tax are a corporation or person beneficially interested in the proceeds of the tax and the auditor who takes the final steps in completing the levy by placing it on the duplicate. Jones vs. Davis, 35 Ohio St. 474. These bills are not filed against either the corporations for whose use the tax will be collected, or against the county auditors. The bill cannot be sustained, therefore, on the special remedy afforded by the sections of the Ohio Statutes above quoted.

Can it be sustained on the general equitable jurisdiction of the court? It is well settled that the mere illegality of a tax is no ground for invoking equitable relief, Shelton vs. Platt, 139 U. S. 591, 599. But we find set up in the bills a ground upon which courts of equity frequently grant relief, and that is to avoid a municipality of suits. If the auditors, the complainant will be compelled to bring a suit either to prevent collection of these taxes or to recover them back after paying them in each one of eighty-seven counties. This will be most oppressive and would certainly seem to furnish ground for equitable interference by this court, unless other objections advanced by counsel for defendant, and now to be considered must prevail.

It is first said that the injunction sought is premature, because against the valuers, and not against the collecting officers. If such a suit can be brought then it is argued that

a bill will lie to enjoin the legislature from passing the bill. This is a non sequitur instead of a reductio ad absurdum. What is here sought to be enjoined is the certificate by the board of appraisers to the county auditors of the amounts to be assessed against plaintiff. The auditors are then by law required to place the same upon the tax duplicate, and deliver the duplicates to the county treasurers as warrants for the collection of the taxes. The duty of the county auditors and treasurers in this matter are wholly ministerial. The law reposes in them no discretion whatever to reduce or modify the assessment. It is said that the state auditor has power to correct all injustice in assessments for taxation and constitutes a tribunal of review for the purpose. I can not agree with this contention. It is true that generally speaking the state auditor is at the head of the taxing department of the state. By section 166 of the Ohio Revised Statutes he is required to instruct the auditors of the several counties in the state; and by section 167, which is the section chiefly relied on, his power is thus defined: "He may remit such taxes and penalties thereon as he ascertains to have been illegally assessed, and such penalties as have accrued or may accrue in consequence of the negligence or error of any officer required to do any duty relating to the assessment of property for taxation or in the duplicate of taxes in any county; provided, that when the amount to be remitted in any one case shall exceed one hundred dollars, he shall proceed to the office of the governor and take to his assistance the governor and attorney-general, and in all such cases may remit no more than shall be agreed upon by a majority of the officers named."

I think this section does not confer any power on the state auditor, the governor, and attorney-general, to correct assessments under the Nichols law, which provides such special machinery for assessments as to prevent its application, otherwise the taxing system of Ohio would present the absurdity of subjecting the quasi judicial action of a board consisting of the state auditor and two others to the review of the state auditor alone in every case where the assessment does not exceed one hundred dollars, and in cases involving more than one hundred dollars would make a majority of the reviewing court to consist of the majority of the court of first instance. The action of the board of appraisers in certifying the assessments to the county auditors is, therefore, a finality.

It is suggested that there is the possibility that the county auditor and county treasurer may refuse to comply with the duty imposed by an unconstitutional law. Certainly these county officers are not tribunals established to consider constitutional questions before whom complainants could be heard. The presumption is that they will obey a law which was in due form passed by the legislature, and will assume its validity especially when it has been treated as valid by the head of the taxing department and the head of the law department of the state. The possibility suggested is too remote, to prevent a court of equity from properly treating the certificate of the board of appraisers, as a final step, directly to the prejudice of the complainants, with no taxing tribunal or authority to whom it can appeal in the procedure provided by the law, before the tax is to be collected. The supreme court of Ohio in Jones vs. Davis, 35 Ohio St. 474, did not hold that a proceeding to enjoin a board of equalization from certifying an assessment to the county auditor was premature. They only held that a proceeding to enjoin the auditor before he had added the assessment to the duplicate was not too late, because, until that time he had not completed his levy, which section 5849 of the Ohio Revised Statutes gives the tax payer a special remedy against him to enjoin. Of course, the complainant here, under section 5849, might bring actions to enjoin the county auditor or county treasurer of each county levying or collecting these assessments, but then the multiplicity of suits would be an accomplished fact, and the basis for general equity jurisdiction in the matter would have disappeared. It is said that the equity jurisdiction to prevent a multiplicity of suits is never exercised except against those who are about to bring the suits. No case is cited which makes this distinction and I do not see any good reason for it.

Again, it is urged that the affidavits filed show conclusively that in no single county will the assessment against the complainant amount to $2,000; wherefore the argument is that the jurisdiction of this court can not be supported by adding together the amounts due in each county. If my conclusion is correct that this action will lie against the board of appraisers, there is nothing whatever in this objection because the amount involved in controversy in the suit is the whole amount to be certified by the board under the law, less the ag-

gregate amount which the complainant must pay in the various counties of Ohio, under such laws as are in force, if the Nichols law is not valid. That difference admittedly exceeds $2,000.00. For this reason I am of the opinion that the bill does not present a case for equitable relief in a federal court.

Another reason advanced by counsel for defendants, why the relief prayed for should be denied, is that the complainant has only tendered or paid to the various county treasurers the amounts due on the valuation of their real and personal property as it claims it to be, according to the local rates of taxation, but has not tendered or paid the amount due on its gross receipts for business within the state of Ohio, as provided by the law, which the Nichols law was passed to supplant and which is in force if the Nichols law is invalid. This objection I shall defer considering until later.

The Nichols law purports to tax only the real and personal property owned by telegraph, telephone, and express companies in Ohio. The gist of the act is contained in the following sentence found in the latter part of section 2778a: "And said board of appraisers and assessors shall, in determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, be guided by the value of said property as determined by the value of the entire capital stock of said companies and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio, in the proportion which the same bears to the entire property of said corporation, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

The validity of the foregoing method of valuation, so far as complainant is concerned, depends on the correctness of two propositions. The first is that the telegraph plant in one state has an added money and taxable value as a plant in that state, because it is physically a part of a great system or machine covering the country. This is substantially the same principle as that involved in the taxation of interstate railroads in Ohio which has met the approval of the state supreme court (Insurance Company vs. Ratterman, 46 Ohio St. 153, 166), and its soundness may therefore be conceded. See also State Railroad Tax Cases, 92 U. S. 575.

The second proposition is that the market value of the aggregate shares of the capital stock of telegraph, telephone and express companies is a proper guide in fixing the true value in money of their real and personal property in Ohio, in constitutional uniformity with the mode of assessing the real and personal property of individuals and other corporations. The language of the legislature is by no means clear in defining the method of valuation, but this much is certain, that the board are enjoined, unless exceptional circumstances require otherwise, to consider the value of all the shares of the capital stock as a basis, or controlling element, in estimating the value of the real and personal property of the corporation. The capital stock is the only element of value specifically mentioned, and that occurs twice in the same involved sentence. Other evidence and rules are referred to, but they are left to this board to select or adopt. The one thing which the board is required to consider in each case is the value of the capital stock. It is true that the board may exercise a discretion in their appraisement to give more or less evidential weight to the value of the capital stock. But here is the legislative declaration that in every case such value must be considered, and the necessary implication is that it is an important element. The object of this clause was to increase the valuation of the property of corporations above that which it would have without reference to the capital stock. The two laws which the Nichols law supplanted in the taxation of foreign telegraph and express companies imposed a tax upon all the real and personal property owned by those corporations in Ohio, and also a tax, decided to be a franchise tax, measured by a percentage of the gross receipts from business done within Ohio. Sections 2774, 2778, Rev. Stat. Ohio: Western Union Telegraph Co. vs. Mayer, 28 Ohio St. 521; Ratterman vs. The Western Union Telegraph Co. 127 U. S. 411. Now, we may take judicial notice of the commendable efforts of the legislature of Ohio, in view of the condition of the state treasury for a number of years past, to increase the taxable sources of revenue, and we may reasonably infer that it was not the legislative intent to reduce the tax upon telegraph companies or any other foreign or domestic corporation. When, therefore, for a tax upon all the personal and real property of such companies assessed without reference to the value of the cap-

ital stock and a franchise tax as well, there is substituted a tax upon the property of the corporation in Ohio on a valuation to be determined, in part at least, by the aggregate value of the shares of its capital stock, we must necessarily infer that this basis of valuation is expected to add substantially to the valuation of the same property when made without reference to such a standard. Convincing evidence is found that this construction of the law is sound in the result of the valuations under the new law as compared with those under the old, and the course taken by the board in every case, which has come to the notice of the court. In each, the board began with the market value of the capital stock and made its deductions from that to reach the value of the property. The intrinsic or cost value of the property seems to have been lightly regarded as compared with market value of the capital stock. Now it is true that what the board of appraisers have done does not necessarily determine the meaning of the law but it is persuasive of the intent of the legislature.

We are led, by this construction of the Nichols law, to consider what necessary relation if any there is between the market value of the capital stock of the companies embraced within its terms and the true value in money of their property as it may be assessed for taxation in Ohio. A share of stock entitles its owner to a proportionate share in the net earnings of the corporation, and upon dissolution, to a proportionate share in the assets of the corporation after the debts are paid. Its value in a corporation whose corporate life is not limited by its charter depends almost wholly on the net earnings of the corporation or on its prospective capacity for producing them. The aggregate market value of the stock of any business corporation therefore approximates an amount reached by capitalizing the aggregate annual dividends on a basis of something higher than the usual rate of interest for money loaned, the rate varying as interest of money loaned varies with the risk of the investment and the certainty of the annual payments. The annual earnings of a business corporation depend, not on the value of the visible tangible property of the corporation as a passive investment, like real estate, or government bonds, or mortgages, but they depend on the good will of the business,

its volume, the speed with which the money capital can be turned over, the business skill and experience and economy of its management. The share of stock is property. It is a chose in action, entitling its owner to yearly payments from a corporation, if there are net earnings. But the elements that are united to produce those earnings are not all or a majority of them in the form of tangible property, though it may be conceded that they were acquired by investing capital. A corporation does not own its capital stock divided into shares. It owns the property which when used in a business with skill and industry, aided by the good will, owned perhaps long before the particular property was ever purchased, will produce the net earnings out of which the dividends on the stock are to be paid. This is true of all active business corporations including telegraph companies, just as it is true of individuals in business, that their annual profits are the result, not of their real estate business plant and merchandise only, but of those things, united with the good will and the skill, experience and economy used in the conduct of the business. Now, it certainly could not be said that the annual profits of a dry goods store capitalized on a basis of six per cent. would afford any proper guide to the value of the real estate, the merchandise and the ready capital used in the business. Where the property earns the money as real estate earns rent, or as money loaned earns interest, the earnings do determine very largely the value of the property, but where, as in a business of an individual or a corporation, the investment is active instead of passive, there is no necessary relation between the value of the tangible property and the earnings. Could any one claim that the value of the presses, types, press franchises, money capital and office furniture and other tangible property of a newspaper, could be determined by its net earnings, or if it be a corporation, by the market value of its capital stock? Clearly not. And why? Because nearly all its capital has been expended in securing circulation, and advertising patronage, or, in other words, good will. This is an extreme example it is said. Take a bank. There is no business in which the capital investment is kept more nearly in the form in which it was, when invested, than in that of banking. And yet it is well known that the assets of a bank are often much less in value than the profits of the business capitalized at the

usual rate of interest. Would the fact that the shares in a banking corporation with a capital stock of $100,000, were selling at $150 each, on a par value of $100, be any evidence that the bonds, choses in action, and money and other resources in the vaults of the bank were worth any more than they appear to be on an appraisement without reference to the value of the bank's capital stock? Certainly not. The increase in the value of the bank's capital stock over its resources is due to the good will which invites the confidence of the public in the honesty and prudence of its management, and attracts deposits and business, and to the skill and experience and foresight of its officers in making profitable and safe loans. What is true of a newspaper, a bank, and a dry goods store is equally true of a telegraph company. As averred in the bill, its earnings, and therefore the value of its capital stock, is largely dependent on its good will, the honesty, skill, economy and experience of its management, and its employes, added to its property. Its net earning capacity is also affected by business arrangements with railroad companies and municipal concessions of the right to use roads and streets. It seems clear to me that the market value of its capital stock has no necessary or proper relation to the value of the tangible property of the company. If it has, then the earning capacity of a dry goods store should be an element in valuing its capital and merchandise; the profits of a newspaper in reaching the assessable value of its presses, plant, and ready capital; the profits of a bank, in deciding upon the value of the bonds, and bills receivable and money in its vaults.

Now it is true that the capital stock of a corporation represents, and is a measure of the tangible and intangible factors of value which unite to earn dividends, and therefore of those factors in which the original capital of the company was invested. The enjoyment of both factors by the owner is protected by the state and both may, in the absence of any constitutional restriction, be subjected to taxation. The aggregate market value of the shares of stock in the company is as good a measure of their united value for purposes of taxation as it is possible to find. The legislatures of some states have taxed the capital of a corporation as invested in both the tangible and intangible factors of profits by reference to the market value of its capital stock.

In such states, it is permissible to tax the property erty of corporations by a different rule from that of individuals, and it is no objection to including in the value of the property or capital of a corporation the good will of the business, even if such an element of earning capacity is not taxed when enjoyed by individuals. But such is not the rule in Ohio. Article 12, sec. 2, of the constitution of Ohio, declares that "laws shall be passed in taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise; and also all real and personal property according to its true value in money." In construing this provision the supreme court of the state has decided that "taxing by a uniform rule requires uniformity not only in the rate of taxation but also uniformity in the mode of the assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden can not exist without uniformity in the mode of assessment, as well as in the rate of taxation. * * * It must be extended to all property subject to taxation, so that all property must be taxed alike equally, which is taxing by a uniform rule." Exchange Bank vs. Hines, 3 Ohio St. 15. If, therefore, we find that good will and those other intangible factors of the value of the capital stock of a business corporation are neither taxable as property themselves under the Ohio laws and constitution, nor as an increment to the value of the tangible property of a corporation, or an individual in business, then an Ohio law which requires the value of the capital stock to be a guide in determining the value of the tangible property of a small class of business corporations must be wanting in that uniformity which the constitution enjoins in tax law and is therefore void.

It becomes necessary, then, to examine the tax laws of Ohio as they tax the property of other corporations and individuals, with the view to determine whether good will, business skill, economical management, and the other intangible sources of net earnings and factors of stock value are taxed against other corporations and individuals directly, or by increasing the valuation of tangible property. The subjects of taxation as property are mentioned in article 12, sec. 2, quoted above, as "all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise; and also all real and personal

property." The legislature defined the meaning of the various terms used in the constitution in sec. 2730, and with one exception, that of "credits," we may well assume that the section is a proper construction of the constitution. The section defines real estate to be not only lands, and buildings, and fixtures, but all rights and privileges belonging or in anywise appertaining thereto. Investments in stocks are defined to be all moneys invested in the capital or stock of a corporation, the stock of which is or may be divided into shares, transferable by each owner without the consent of the other stockholders, for the taxation of which no special provision is made by law, held by persons residing in this state. Personal property is defined to be every tangible thing which is the subject of ownership, whether animate or inanimate, other than money, and not forming part of any parcel of real property as before defined, and the capital stock, undivided profits, and all other means, not forming part of the capital stock of every company, whether incorporated or unincorporated, interests in ships and boats, and money loaned on real estate security. Credits are defined to be the excess of the sum of all legal claims and demands whether for money or other valuable thing, or for the labor or service due or to become due, to the taxpayer, estimated at its true value in money, over and above the legal debts due him. This definition, as already stated, is not in compliance with the constitution because it permits a reduction of the sum of legal demands of the tax payers by the legal debts due him, but otherwise, the constitutionality of the definitions of the section has not been questioned. Exchange Bank vs. Hines, 3 Ohio St. 1. Now it seems clear that the good will of a business and the other intangible factors of business earnings are not included in these definitions of personal or real property, or of the other terms describing the kinds of property to be taxed under the constitution. It would certainly cause a surprise and shock to the business community of Ohio, to have it decided that it is the duty of every business firm and corporation to return for taxation the estimated value of its good will, and the estimated value of the skill, and experience and economical management of the employer and employed, or to use such factors of his profits to increase the taxable valuation of his tangible business capital. Section 2731 subjects all property as it is described in

section 2730, whether belonging to individuals or corporations (except certain exempted property) to taxation. Sections 2734 to 2738 make provisions for the listing by persons of all their personal property, moneys, credits, and investments in bonds, stocks, and otherwise. Section 2739 prescribes the rules for valuing property of persons as follows:

"In listing personal property it shall be valued at the usual selling price thereof, at the time of listing and at the place where the same may then be; and if there be no usual selling price known to the person whose duty it is to fix a value thereon, then at such price as it is believed could be obtained therefor, in money, at such time and place; investments in bonds, in stocks, joint-stock companies, or otherwise, shall be valued at the true value thereof in money; money whether in possession or on deposit shall be entered in the statement at the full amount thereof, except that depreciated circulating notes shall be entered at their current value; every credit for a sum certain payable either in money, property of any kind, labor or service, shall be valued at the full amount of the sum so payable, except that if it be for a specific article, or for a specified number or quantity of any article or articles of property, or for a certain amount of labor or services of any kind, it shall be valued at the current price of such property, or of such labor or service at the place where payable; and annuities or moneys receivable at stated periods, shall be valued at the sum which the person listing the same believes them to be worth in money at the time of listing."

Merchants and manufacturers are required to pay, not upon the stock of merchandise which they have on a certain day in the year, but they are required to average the value of their stock on hand each month of their business, and pay tax on that as personal property. In other respects, their returns are like those of other persons. Section 2744 prescribes the ordinary mode of assessing the taxable property of all corporations except banking corporations in the state of Ohio, whether organized in this state or not. It requires their chief officers to list for taxation "all the personal property, which shall be held to include all such real estate as is necessary to the daily operations of the company, money and credits of such company or corporation, at the actual value in money,

in manner following:" In all cases return shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each township, village, city, or ward therein. The value of all movable property shall be added to the stationary and fixed property and real estate and apportioned to such wards, cities, villages or townships, pro rata in proportion to the value of the real estate and fixed property in said ward, city, village, or township, and all property so listed shall be subject to and pay the same taxes as other property listed in such ward, city, village or township.

Section 2740 requires all personal property of every description, moneys and credits, investments in bonds, stocks, joint-stock companies or otherwise, to be listed in the name of the owner thereof on the day preceding the second Monday of April in each year, but provides that no person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of the company. The property of railroad companies is assessed for taxation as a unit. The road bed, the equipment, the money and choses in action, are added together and the value distributed according to mileage through the counties of the state and between Ohio and adjacent states. Unincorporated banks are taxed on their assets less their liabilities. Incorporated banks are not taxed at all, but their stockholders are taxed under section 2762, upon their shares on a valuation based on the resources of the bank.

It is very manifest from this review of the provisions for assessing the taxable value of the tangible property of individuals and corporations in business, that neither the profits of the business nor the good will, nor those other intangible factors in the earnings of profits are required to be considered, and it is very certain that they never are considered.

The difference between the taxable value of the property of a corporation and the value of its shares was considered by the supreme court of Ohio in Insurance Co. vs. Ratterman, 46 Ohio St. 153. The question in the case was whether shares of stock in a foreign railroad corporation which paid taxes on a large amount of property in Ohio, but also had much

property elsewhere, were returnable for taxation in the hands of their owners. The holders sought exemption under that proviso of sec. 2746 Rev. St. Ohio, already quoted, which exempts holders of shares of stock from returning them when the corporation pays taxes on its "capital stock" in Ohio. The word capital stock as there used had been constructed to mean all or substantially all the property of a corporation. The claim of the stockholders was denied. In meeting the argument that to tax the shares in the hands of the stockholders, and the property of the corporation, too, was double taxation. Judge Spear, at page 162, in the course of an able opinion used this language: "The corporation is the legal owner of all the property of the company, real and personal, and within the powers conferred upon it by its charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. The interest of the shareholder entitles him to participate in the net profits in proportion to the number of his shares; to have a voice in the selection of officers, to manage the business of the company in like proportion, and upon its dissolution, the right to his proportion of the property of the corporation that may remain after payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him; is under his sole control, so that he may sell or hypothecate it. He is entitled, from net earnings of the corporation, to dividends upon his stock, and the value of the stock depends largely upon its capacity for earning dividends. The shares of stock may be worth much more than the property of the corporation, that is, the franchise may be very valuable while the visible capital may be of but litle value, and dividends may be greatly out of proportion to the tangible property, as frequently occurs in regard to street railroads, gas companies, electric light companies, etc., Farrington vs. Tennessee, supra 686, 687; Watson vs. Spratleu, 10 Exch. 236; People vs. Commissioner, 4 Wall. 244; Union Bank vs. State, 9 Yerger, 490; Cook vs. Burlington, 59 Iowa, 251. It follows from this that although the shareholder may be affected as regards the extent of his dividends by taxation of the property of the corporation, yet a tax on the shares is not a tax on

the capital of the company, and e converse a tax on the capital is not a tax on the shares held by the stockholders. Taxation of the capital and property of the corporation, though it be accepted by the state as an equivalent for, is not the same as a tax on the shares."

In the case of Miller, Treasurer, vs. The First National Bank, 40 Ohio St. 424-428, Chief Justice Minshall did say: "A share in the bank is but a fractional part of its capital owned by one who contributed an equivalent part of the capital or his transferee; and the aggregate of all the shares held by the individuals in a bank is equal to the aggregate of its capital. So that, if all the shares in a bank were assessed for taxation in its name, and payment of the tax required of it, the effect would be precisely the same as a tax upon the aggregate capital of the bank." This statement was true, because under the law for assessing the value of the shares of the bank, the auditor did not take their market value, but he found the value of each share by adding all the property of the bank, and money, and other resources together, and dividing by the number of shares. The words quoted have therefore no application to the relation of the market value of shares to the visible capital even in a bank, and still less to that in a trading corporation.

It seems clear for the reasons stated that the market value of the shares of capital stock in the complainant and other like companies bears no necessary relation or proportion to the value of the tangible property in Ohio or elsewhere; that the market value of the shares depends on elements of value not taxable in Ohio and not used to determine the value of the taxable property of individuals or other corporations. If so, it seems necessarily to follow that it is prescribing an unconstitutional rule for the valuation of the property of telegraph, telephone, and express companies to enjoin upon the appraisers of their property, as the Nichols law does, to consider as an important element, increasing the valuation of their property, the value of the aggregate shares of the capital stock of those companies. The bill avers that the amount assessed against the complainant is three times the real value of its property in Ohio. The affidavit of the state auditor shows that the mode of reaching the value of the property of the

telegraph company in Ohio was to reduce the total market value of all the shares by the real estate out of Ohio, and the stocks and bonds in the treasury of the company, and to take the remainder as the value of the lines of the company, reaching the part of that value in Ohio by using the ratio of the mileage of the lines in Ohio to their total mileage. This appraisement was not an appraisement of the property of the company in Ohio at all. The board entirely ignored the fact that in this result was included the good will of the company, the valuable and economical arrangements with the railroad companies for joint use of lines, the public concessions by which streets and roads are occupied, the skill and experience of the employes, none of which are taxable under the laws of Ohio, but all of which contribute, as the bill avers, in a large degree to the net earnings upon which the market value of the capital stock is based. Tax by such a measure of value is an income tax and not a property ad valorem tax. It is true that the $3,000,000 which, by the mode of valuation just described, the board reached as the actual value of the property in Ohio, was reduced to $2,000,000 to accord with the unconstitutional and unlawful practice prevailing among assessing officers in this state, of valuing not at the true value in money, but at two thirds that value. That reduction, however, does not remove the illegality in such a valuation of the property caused by the assumption that a telegraph company's property in the sense of the Ohio constitution is equal to the market value of its capital stock.

But it is said that I am wrong in constructing the Nichols law to require, as an important and controlling element in the valuation of telegraph property, the market value of the capital stock of the company, and that it is my duty as a judge to sustain the law if it can be done by construction. For the reasons I have given I do not think that the market value of the shares of capital stock has any legitimate effect in increasing the value of the tangible and visible property of this telegraph company in Ohio. It does not help the law any to point out that the market value of the stock is only to be used to determine the true value in money of the company's Ohio property and that if in fact the value of the stock should have no effect in the estimate we must give controlling weight to

the words which embody the standard of value fixed by the constitution. The board is enjoined to determine the value of the property to be taxed by using as a guide the value of the capital stock and other rules which shall enable them to fix, not the true value in money of the company's property, but its true value in money in proportion to the entire property of the company, as determined by the capital stock and other rules. In other words, it is merely a legislative declaration that the true value in money of the entire property of the company is determined by the entire capital stock of the company, and other rules, and the true value in money of the Ohio part is merely a proper proportion of the value of the entire property thus determined. The only construction which would eliminate the error of the law, is one which would require the board to ignore the market value of the shares as an element of value. If this were a possible construction, as I think it is not, the result in this case would not be different, for the present assessment would have to be enjoined as not authorized by law. Certain it is, that courts will not permit injustice to be done to a class of tax-payers by a law which is so worded as to mean one thing to the courts when its validity is attacked, and another thing to the taxing officers when they come to enforce it. Either the law means what the officers construe it to mean, and its validity is to be tested on that construction, or they are to be enjoined from enforcing it except as the courts shall construe it. Cummings vs. National Bank, 101 U. S. 153.

Much stress has been laid on two cases decided by the supreme court of the United States cited in support of this law. The first, that of the Western Union Telegraph Co. vs. Massachusetts, 125 U. S. 530, was a suit for taxes by the attorney-general of Massachusetts against the telegraph company, under the general law of the state. By that law all corporations chartered by the state were required to return the market value of the aggregate shares of their capital stock and all their works, structures, real estate and machinery subject to local taxation without the state. Railroad and telegraph companies were required to return the whole length of their lines and the length of them without the state. Every corporation was required to pay what in the law is called "a tax upon its corporate franchise at a valuation thereof equal

to the aggregate market value of the shares in its capital stock," after deducting, in the case of railroad and telegraph companies, whose lines extended beyond the limits of the commonwealth, such portion of the whole valuation of their capital stock, ascertained as aforesaid, as was proportional to the length of that part of their line lying without the commonwealth, and also an amount equal to the value of their real estate and machinery located and subject to local taxation within the commonwealth, and, after deducting in the case of other corporations, an amount equal to the value of their real estate and machinery subject to local taxation wherever situated. By another section these provisions were made applicable to a foreign telegraph company. The answer of the telegraph company denied the right of the state to tax its corporate franchises received from another state, and made its chief defense that such a tax was really a tax upon the franchises received by it from the United States government, by virtue of which it was given the right to occupy all the post roads in the state as an agent of the government and for interstate commerce, and that even as a tax upon its franchise, it was unfair because it did not deduct from the market value of its entire capital stock the real estate owned by the company in other states. But there was no averment or evidence to show that the value of the company's property in the state was less than the amount assessed against it. The supreme court gave most of their consideration to the defence founded on the fact that the company was enjoying a franchise from the United States government, holding that though this prevented the state from excluding the company from post roads, it did not prevent the state from taxing their property. The court upheld the tax as a tax against the corporation on account of the capital owned and used by it in the state of Massachusetts. The discussion is summed up by Mr. Justice Miller as follows (125 U. S. p. 552):

"The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization, on account of property owned and used by it in the state of Massachusetts, and the proportion of the length of its lines in that state to their entire length throughout the whole country is made the basis for ascertain-

ing the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by sec. 5263 of the Revised Statutes or by the commerce clause of the constitution. It is urged against this tax that in ascertaining the value of the stock no deduction is made on account of the value of real estate and machinery situated and subject to local taxation outside of the commonwealth of Massachusetts. The report of examiner Fisk, to whom the matter was referred, to find the facts, states that the amount of the value of said real estate outside of its jurisdiction was not clearly shown, but it did appear that the cost of land and buildings belonging to the company, and entirely without that state, was over three millions of dollars. In the statement of the treasurer of the company, it is said that the value of the real estate of the company within the state of Massachusetts was nothing. Since the corporation was only taxed for that proportion of its shares of capital stock which was supposed to be taxable in that state on the calculation above referred to, and since no real estate of the corporation was owned or taxed within its limits. We do not see why any deduction should be made from the proportion of the capital stock which is taxed by its authorities. But if this were otherwise, we do not feel called upon to defend all the items and rules by which they arrived at the taxable value on which its ratio of percentage of taxation should be assessed; and even in this case, which comes from the circuit court, and not from that of the state courts, we think it should appear that the corporation is injured by some principle or rule of the law not equally applicable to other objects of taxation of like character. Since, therefore, this statute of Massachusetts is intended to govern the taxation of all corporations therein and doing business within its territory, whether organized under its own laws, or those of some other state, and since the principle is one which we can not pronounce to be an unfair or an unjust one, we do not feel called upon to hold the tax void, because we might have adopted a different system had we been called upon to accomplish the same result. It is very clear to us when we consider the limited territorial extent of Massachusetts, and the proportion of the length of the lines of this company in that

state to its business done therein, with its great population and business activity, that the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not unfavorable to the corporation, and that the details of the method by which this was determined have not exceeded the fair range of legislative discretion. We do not think that it follows necessarily, or as a fair argument from the facts stated in the case, that there was injustice in the assessment for taxation."

The Massachusetts case has no application whatever to the question we are now considering under the state constitution. The question which the court had there to consider was whether the mode of assessing the value of the company's property was unfair in two respects. Was it unfair with respect to the mode of assessment against like property in Massachusetts held by other corporations? Second, did it include in the valuation against the telegraph company anything not within the taxing jurisdiction of Massachusetts? As to the first question, the court found that by general law, the state taxed all corporations on the difference between the assessed value of the tangible property subject to local taxation and the market value of the shares of the capital stock. This, though in name a tax on the franchises, was held to be a tax on the capital of the corporation used in its business. The property as thus valued of course included the element of the good will in Massachusetts, the skill and economy of the local management, and local franchises which the money capital of the corporation had been invested to secure. The elements of value were all within taxing jurisdiction of Massachusetts, and, as they were taxed as capital against the corporations of Massachusetts, there was no reason why they should not be taxed as such against foreign corporations whose enjoyment of the same things of value were protected by the law of the state.

The question in the case at bar is whether the mode of valuing complainant's property under the Nichols law is within the meaning of article 12, section 2, of the Ohio constitution, according to its true value in money, and uniform with the valuation of other property taxed in this state. I have tried

to show that the valuation for taxation of property used in business in Ohio by including as an element of its value, the good will of the business, and the other things, not property, which unite to earn profits, is not the mode prescribed for the valuation of any property except that of the companies covered by the Nichols law, and is presumably therefore not a method of assessing according to its true value in money as enjoined by the Ohio constitution.

In the case of the Pullman Palace Car Co. vs. Pennsylvania, 141 U. S. 18, the tax which was disputed, was in terms a tax upon the capital stock of the company which owned one hundred cars or more passing constantly into, through, and out of the state of Pennsylvania. The amount of the tax was determined by taking that proportion of the entire capital stock of the company, which the number of miles operated by its cars in Pennsylvania bore to the total mileage operated by the company. The court below sustained the tax as levied upon that part of the capital stock invested and used in Pennsylvania. No complaint was made by the company that the amount taxed exceeded the value of the company's capital invested in property which was at times within the taxing jurisdiction of Pennsylvania. The sole question was, whether the tax based on the mileage of the cars which were engaged in interstate commerce was not a tax on interstate commerce. The discussion was as to the situs of the property. There is no constitutional limitation in Pennsylvania, as there is in Ohio, which requires the property of corporations to be taxed in the same mode as that of individuals, and which prevents the valuation of their taxable property on a different scale from that of individuals. The Pennsylvania case is quite as inapplicable to the case at bar as the Massachusetts case, and for the same reasons.

A strong argument has been made to show that the companies embraced within the Nichols law are of a peculiar class, and that therefore special rules for the assessment of their property are not a departure from true uniformity in taxation. The case of the Pacific Express Company vs. Siebert, 142 U. S. 339, is cited to this point. In that case the question was, whether a tax upon the gross receipts of an express company was violative of section 3, article 10 of the con-

stitution of Missouri, which required taxes levied to be "uniform upon the same class of subjects within the territorial limits of the authority levying the tax," when such a tax was not imposed on railroad companies. It was held that there was no lack of uniformity in the discrimination between the two classes of corporations because of the inherent difference in the manner of conducting their business. Mr. Justice Lamar, speaking for the court, said on page 351: "This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected, either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation, and of a just adaptation to its burdens." That this is true as an economic principle, and that it is equally true in considering the question whether the enforcement of a tax against any property by a state is the denial of the equal protection of the laws secured by the fourteenth amendment to the federal constitution, must, of course, be conceded, but that it is true as constitutional law in Ohio, must be denied. The constitution of Ohio does impose the same tax on every species of property as therein defined, according to its true value in money. The constitution of Missouri permitted the classification of property and diversity of taxation on the different classes. The Ohio constitution does not. Speaking of the differences between railroad and steamboat companies and express companies, Mr. Justice Lamar said, in the same case: "The vital distinction is this; railroad companies pay taxes on their road beds, rolling stock, and other tangible property, as well as generally upon their franchises, and steamboat companies likewise pay tax on their tangible property. This tax is not necessarily an ad valorem tax, at the same rate as is paid on other private property in the state belonging to individuals. Generally, indeed, it is not, but is often determined by other means and at different rates according to the will of the legislature. Kentucky Railroad Tax Cases, 115 U. S. 321-337. On the other hand,

express companies, such as are defined by this act, have no tangible property of any consequence, subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts from business as transacted."

No one can read this passage without seeing that the learned justice was dealing with a state constitution very different from that of Ohio. It is true that a tax on gross receipts has been sustained in Ohio (Telegraph Co. vs. Mayer, 28 Ohio St. 521), not as a tax on property, but as a tax on a franchise which is not property in Ohio (Bank vs. Hines, 3 Ohio St. 1). Whenever property is taxed in the latter state, whether it be the property of a railroad, a steamboat or an express company, it must pay the same tax, according to its true value in money.

It needs no argument to establish that telegraph companies, express companies, and telephone companies, conduct a business yielding enormous profits in proportion to the tangible property owned by them, and that the protection which they enjoy from the government of the state requires and justifies the imposition of taxes upon them far in excess of the general rate per cent. on their taxable property assessed at its true value in money, as required by article 12, sec. 2, of the constitution of Ohio; but it does not justify the fictitious valuation of their property for taxation in violation of that section. The inequality must be remedied by taxes based on something other than property, and this brings us to another argument on behalf of defendants.

It is said that if the tax imposed by the Nichols law can not be supported as a property tax, it may be supported as a tax upon the franchise of the corporation to do business as such in Ohio, or as a tax upon its business in the state. The question of the power of the legislature of Ohio, under its constitution, to tax franchises or business has been much mooted, and in the language of some of the earlier decisions the power was expressly or impliedly denied. But an examination of the later decisions of that court seem to me to leave no doubt that by a proper construction of the constitution such a power is vested in the general assembly. Article 2, section 1, of the constitution provides that the legislative power of this state

shall be vested in a general assembly which shall consist of a senate and house of representatives. By this section it has been held that the taxing power was conferred on the general assembly subject to such limitations as are afterwards found in the constitution. Article 12, section 2, enjoins the legislature to pass laws taxing by a uniform law all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property. The effect of this is only to limit the character of the law which the legislature may pass when taxing that which is property within the terms used in that article. It has no effect to limit the character of a law passed to tax business or franchises, nor does it take away the power to tax them conferred by the general grant of legislative power. In Western Union Telegraph Co. vs. Mayer, 28 Ohio St. 533, a tax upon the gross receipts of the complainant company was sustained as a tax upon the privilege it enjoyed of doing business and exercising its corporate franchise within the state. This decision has never been reversed or questioned as far as the state question is concerned, and fully established the right contended for by counsel for the state. See also Baker vs. Cincinnati, 11 Ohio St. 540, 543; Adler vs. Whitbeck, 44 Ohio St. 565; Anderson vs. Brewster, 44 Ohio St. 585; Marmet vs. State, 45 Ohio St. 68; State ex rel vs. Reinmund, 45 Ohio St. 214, 218; Ashley vs. Ryan, 49 Ohio St. 504.

While, therefore, the power of the legislature to tax the privilege of the telegraph company to exercise its corporate franchise in Ohio must be conceded, I can not see how it is possible to construe and enforce the Nichols law as one taxing the franchise or the business of the company, or as one taxing the property and franchise and business of the company all together, because the law fixes no definite mode of ascertaining the amount of tax to be imposed for franchise and business, but leaves the amount, above the intrinsic value of the property, to be fixed at the discretion of the board of appraisers. It may be conceded that strict uniformity in a franchise or business tax as to different classes of corporations is not necessary because the power is not controlled by article 12, sec. 2; yet it is certain that the legislature can not delegate to a board of appraisers to determine how much shall be im-

posed on any corporation or class of corporations as a franchise or business tax. Had this law fixed exactly the amount of tax to be paid by fixing the value to be assessed as a certain proportion of the capital stock, it could not, as I have attempted to show, be held valid as a property tax, but it would be a question whether it might not be supported under the state constitution as a property and franchise tax together (see suggestion by Judge Johnson in the Western Union Telegraph Co. vs. Mayer in the 28 Ohio St. 531-540), or as a franchise tax only. In the Mayer case, the amount of the tax was certainly fixed by the gross receipts and the rate per cent. of property tax in such county. But here the board is enjoined to value property and consider as an element in the value of it, that which has no necessary relation to its value as such, and which in view of laws taxing other property could not constitutionally affect its taxable value. What weight shall be given to this element is left to the board. To uphold the law as a tax on a franchise or business would be therefore to commit to the discretion of the board the amount which should be paid as tax for such franchise or business. This would be a delegation of legislative power to executive officers, not permissible under the constitution. Cincinnati, W. & Z. R. Co. vs. The Commissioners of Clinton County, 1 Ohio St. 77-87.

I have reached the conclusion that this law is unconstitutional with great reluctance, and only after much consideration of it, fully realizing the duty of a court to sustain a law if it can be done, particularly under the circumstances of this case. It is exceedingly embarassing for a federal court to pass upon the validity of a state law under a state constitution in advance of the supreme court of the state, which is the ultimate tribunal on all such questions. Pelton vs. Bank, 101 U. S. 143-144. For this reason I ordered a re-argument of the case. If I could avoid passing on the question before the state supreme court shall have passed on it, with a due sense of my judicial obligation to litigants who, under the constitution and laws of the United States, have the right to invoke my judgment, I would gladly do so; but I have now held the case since December last, when the first argument was made, and since March 23d, when the second argument was made,

and I think I ought not to delay longer when pressed by counsel for a decision. I ought to add that if the case could have been made to turn on a question under the federal constitution, I should have passed the state question without deciding it; but this was impossible. As, in my opinion, the law is invalid for the reasons given it is unnecessary to consider the federal questions raised.

One thing more remains to be said, and that is in regard to the payment of taxes by the complainant. If the part of the Nichols law prescribing the mode of valuation is to be held invalid, then the whole law must be held invalid, because it is manifest that it was the invalid parts which induced the passage of the other provisions. The whole system constructed in the Nichols law revolves around that as its prominent feature. With the law must go the clause repealing old section 2778, for it is certain that the repealing clause would not have been passed had the legislature anticipated a judicial declaration of the invalidity of section 2778a. The result is that section 2778 of the Revised Statutes is now in force and the complainant ought to pay its taxes thereunder. It has, as the amendment to the bill and affidavits show, paid taxes due under section 2778. Until this is done, it is not entitled to equitable relief. Unamended section 2778 prescribes that the telegraph company shall pay at the same rate per cent. as the tax on property in each county, upon the gross receipts in the county from business done within the state. In counties where the tax under the Nichols law exceeds that under old section 2778, the preliminary injunction prayed for will be granted on condition that the taxes due therein under old 2778, are paid within ten days from the filing of this opinion. In counties where the taxes to be paid under old 2778 exceed those due under the Nichols law, which must be the case in two or three counties with large cities, the complainant can not be injured even if the certificate of the board of appraisers goes down to the auditor and the tax is collected, for if the Nichols law is invalid the company must there pay more taxes than those certified. As to the certificate to such counties, the board will not be enjoined. Counsel can doubtless agree in respect to which counties certificates should not be enjoined, and prepare the order of injunction accordingly. If

within ten days the additional taxes have been paid in counties to be affected by the injunction thus drawn, and another amendment to the bill with affidavit is filed showing such payment, the demurrer to the amended bill will be overruled; otherwise the bill will be dismissed.

OPINION OF JUDGE TAFT.

Filed in Circuit Court, April 23, 1894, in No. 337 (Adams Express Company Case for 1893).

The Adams Express Company, a joint-stock company, under the laws of New York, by its president, Henry Sanford, vs. Ebenezer W. Poe, auditor of the state of Ohio, John K. Richards, attorney-general of the state of Ohio, and William T. Cope, treasurer of the state of Ohio.

Reported in 61 Fed. Rep. 470.

This is a suit in equity to enjoin the assessment of a tax brought by the Adams Express Company, a joint-stock company under the laws of New York, in the name of its president, Henry Sanford, against the state auditor, attorney-general and state treasurer of Ohio. It now comes on for hearing on demurrer to the bill and on motion by complainant for preliminary injunction.

The main questions at issue are the same as those considered in the opinion just filed in the case of the Western Union Telegraph Company against the same defendants.

The bill avers that the complainant prepared and filed with the state auditor a statement for the year 1893, of the amount of its capital and property, and of its gross receipts, in each county in the state of Ohio, and the aggregate value of its shares, together with a detailed report of all the property owned by the complainant in the state of Ohio, and where located, and the amount at which the same was assessed for taxation; that the defendants, as a board of appraisers under the Nichols law, fixed in accordance with its requirements the value of the property of the complainant within the state of Ohio, at the sum of $460,033.08; that they threaten to certify the sum to the auditors of the various counties, as directed by the statute, after apportioning the amount, in the ratio of the gross receipts of complainant from its business in each of the counties to the entire gross receipts in the state; that unless restrained by an order of this court the defendants will make such certification to the auditors of 67 counties, in which complainant does business who will at once, as required by the said pretended laws, certify the

same to the respective treasurers of each of said counties for collection, where it will be necessary, unless the board is restrained, to bring suits to enjoin the collection of the assessment; that the rate of taxation in Ohio for 1893 varies according to the county from 2½ to 3 per cent., so that the aggregate assessment against the complainant upon the illegal and excessive appraisement will amount to between $12,000 and $14,000, and in one or more counties will exceed $2,000; that the complainant owns no line of railroad in the state of Ohio, and that it conducts its business on many lines of railroad under contract with owners of said railroads; that it owns no real estate in said state, except such as is used in stabling its horses, owned and used by it in the collection and distribution of goods, wares and merchandise, and its personal property in said state consists entirely of office furniture and tools, horses and wagons; that the total value of its personal property in the state of Ohio does not exceed the sum of $53,500.00; that it has paid all taxes due upon its real estate within the state to date; that the Nichols law is unconstitutional and void, in this, that it does not provide a method for the taxation of property according to the true value in money, but is really an attempt to enforce against telegraph, telephone and express companies the payment of a tax for the privilege of doing business in said state by placing a fictitious value upon their property not authorized by the constitution of the state of Ohio; that the scheme of taxation set forth in said alleged law, while professing to tax property in the state of Ohio does not do so, because it directs the board of appraisers in ascertaining the value of the property of express companies in Ohio to be "guided by" and to "determine the value" of the companies' property in said state by the value of the companies' capital stock; that the value of the companies' capital stock is fixed and determined by the nature, extent and uses of its property, not only in Ohio but in many other states of the United States, and by the skill, diligence, fidelity and success with which its business is conducted in all these states; that complainant employes many thousands of men who are constantly engaged as messengers in carrying goods, wares and merchandise from one part of the country to another, and otherwise, and that its income is largely the result of their efforts; that it owns valuable securities of other companies and

holds valuable contracts and business arrangements with other corporations, and that of all these with the good will which it has secured in the course of more than fifty years of service to the public in said business go to make up the value of the shares of its capital; that the whole number of shares of said company is 120,000, and the market value of said shares, of the par value of $100.00, each, has ranged from $140.00 to $150.00, a price very much above the actual value of all the property of said company; that the law is a tax upon interstate commerce; that the method of taxation, if enforced against it, will destroy the business of complainant in Ohio, and compel it to abandon the said state, to its great and irreparable damage. The prayer of the bill is that a multiplicity of suits may be avoided, and that the injury threatened as above set forth may be averted by a preliminary injunction, and that after hearing, a final injunction shall be granted against the defendants from certifying the appraisements under the Nichols law to the county auditors.

Subsequently, an amendment to the bill was filed averring the payment of taxes upon the real and personal property of the company in each county in Ohio. An affidavit was filed by the defendants, showing the method by which the appraisement of the defendants was reached. The affidavit shows that the board had the following facts before it: That the number of shares of the capital stock of the Adams Express Company was 120,000, that the market value was from $140 to $150 per share, making the actual amount of 120,000 shares at $140 per share, $16,800,000; that the total value of the personal property in Ohio of the Adams Express Company, consisting of office furniture, horses and wagons, was $53,080.74, and that the gross receipts of the business done by the company within the state of Ohio for the year ending the 1st of May, 1893, was $175,034.00; that the total value of the real estate of the Adams Express Company every where was $3,050,272.47, and that the total value of the personal property of the company was $1,034,481.43; that in the statement of the Adams Express Company were included reports from 363 offices; that from two of these offices the personal property was returned of the value of less than $1.00; from 72 of the offices the personal property in each instance was returned at a value of $1.00; from 51 offices the value of the

personal property returned was over $1.00, and under $2.00; that the express company made no returns of safes, pouches or other personal property used on the railroad lines in the state in the transaction of its business. The affidavit shows, and so do the minutes of the board, that "in arriving at the value of the property of these express companies taxable in Ohio, the board did not follow any fixed rule, except the rule that property in Ohio is ordinarily taxed at not more than two thirds of its actual value, and the law governing this board. The board considered the facts already stated set out in the returns and supplementary statements, and also other facts in said returns, and in the testimony of the authorized agents of the companies who appeared before the board. For purposes of comparison, the board examined the gross receipts returned by these companies in preceding years. Taking all the information the board had or could secure, the value of the capital stock of the company, its gross receipts within Ohio, the return of personal property made, and the character thereof and evident undervaluation and omission therein, the number of offices, the amount of business done, the nature and value of the property and capital required to carry on such business, and other evidence and information, the board in each instance ascertained what it considered the fair proportion of the property of the company employed by it in Ohio, and fixed the value of the property of such company situate and taxable therein, being guided in determining the value of the property by the value of the entire capital stock and other evidence and information before the board."

Ramsey, Maxwell & Ramsey, for complainant,
J. K. Richards, Attorney-General, and
Thos. McDougall, for respondents.

Taft, Circuit Judge, after stating the facts as above:

The validity of the Nichols law has been considered in the opinion filed at the same time with this in the case of the Western Union Telegraph Company against the same defendants and all the questions of law therein considered are raised by the bill and demurrer, and the motion for an injunction in this case. The question of jurisdiction by reason of the amount involved is also the same as in the Western Union Telegraph Company case. It is admitted that the difference between the aggregate amount of the certifications to the

county auditors about to be made by the defendants against the Adams Express Company under the Nichols law, and the amount which that company will pay under previous laws, if the Nichols law is finally held invalid, amounts to $241,-918.34, which difference at the rate of taxation prevailing in Ohio makes a tax of from $6,000 to $7,000. It is true that in no single county does this tax difference equal or exceed to $2,000; but as already held in the Western Union Telegraph Company Case, I do not hink that the difference in any one county is the measure of the amount in controversy in this section. There is very little to add to what has been said in the telegraph opinion. The lack of uniformity in the mode of assessment under the Nichols law with that generally prevailing in Ohio, in respect to property of individuals and other corporations is more marked in the case of this complainant than it was in the case of the telegraph company. There is a suggestion in the report of the assessors that the express company did not return all its property, because its return did not include the safes and pouches which must be used in its business. But it is not claimed, and could not be, that the failure to return the safes is an explanation of the difference between $53,000.00, the amount returned by the company as the value of its property in Ohio, and the $460,000 at which the board has assessed the value of that property. The earning capacity of an express company, which largely determines the value of the shares of its capital stock, is even more dependent than the earning capacity of a telegraph company upon its good will, skill and honesty of its employes, and upon its franchises and other rights and privileges not property. A very important source of the revenues of an express company is the business arrangements which it has with railroad companies, by virtue of which, for a lump sum, fixed annual payments, or percentage of gross receipts, the railroad company permits a particular express company to use its cars for the transportation of its merchandise, and to use its stations, depots and employes for the transaction of its local business. It is very doubtful, in my mind, whether such a business arrangement is personal property to be returned for taxation under the laws of Ohio. It certainly is not real estate, because it gives an express company no interest in the land. It is intangible. The making of such a contract probably so involves the per-

sonal character, so to speak, of the contracting express company, its good will, and its reputation for honesty and promptness, that a contract made with it would be inalienable by it. It is certain that express companies have never been required to make returns of such contracts as personal property, and the definition of personal property given in section 2730, does not include it, for personal property as there defined, is as follows: "The terms 'personal property' shall be held to mean and include, first, every tangible thing being the subject of ownership, whether animate or inanimate, other than money, and not forming part of any parcel of real property as hereinbefore defined; second, the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stock, profits, or means by whatsoever name the same may be designated, inclusive of every share or portion, right or interest, either legal or equitable, in and to every ship, vessel or boat, of whatsoever name or description, used or designed to be used, either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel or boat shall be within the jurisdiction of this state or elsewhere, and whether the same shall have been enrolled, registered or licensed at any collector's office or within any collection district in this state or not; third, the money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for the same, if between the parties the same is considered as security merely."

Such contracts or business arrangements would seem to be more nearly included as "credits" which are defined by the same section as follows: "The term 'credits' shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due, to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this state, other than such as are held to be money as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money), over and above the sum of legal bona fide debts owing by such person."

And yet it is doubtful whether the right to enforce a contract unexecuted on either side could be said to be a legal

demand for services due or to become due. However this may be, even if the value of such contracts were properly to be taxed as property in Ohio, there still would remain the good will of the business, the skill and experience of the officers, the discipline among and honesty of the employes of the company, which contribute so largely to the earnings and yet are not taxable property in Ohio.

The suggestion is made that the return of the company is an undervaluation because no personal property, or a very small amount, is returned from many offices of the company in Ohio. I do not know why that should indicate undervaluation, because it plainly grows out of the fact that, at the many small stations along the lines of the railroad upon which the express companies operate, the express company uses the office furniture and the office of the railroad company, and has no property of its own. There was, in this case, no mileage basis for the distribution of the capital stock, and the board of appraisers are unable satisfactorily to explain the basis upon which they affixed, to property returned by the express company as worth $53,000.00, an additional value of over $400,000.00, except that in reaching this additional value they considered the gross receipts of the company in Ohio, and the market value of its entire capital stock, and other evidence and information. This only confirms the conclusion reached in the case of the telegraph company, that the board construed the Nichols law to mean that there should be appropriated to the state of Ohio for taxation, as property within the state, a fair share of the aggregate market value of the capital stock of the company.

It is very true, as said by the supreme court, in the case of Pacific Express Co. vs. Siebert, 142 U. S. 339, that the tangible value of express companies is in a very small ratio to the protection which they receive from the government of the state, and therefore that it is entirely just that their burdens of taxation should not be proportioned to the visible tangible property upon which they may be taxed. But the difficulty in Ohio is that, under the constitution, the property of the corporations and individuals must be taxed by a uniform rule, and the inequalities of taxation produced by the fact that larger earnings are made by corporations with small tangible property, can not be obviated by affixing to the property of such

corporations a fictitious value plainly not based on the true value of it in money. The tax must be imposed on something other than property.

The same order of injunction will be made in this case which was directed in the case of the telegraph company. As under the old law the taxes paid by the telegraph companies were proportioned to the gross receipts in each county, and the same method of distribution is prescribed under the Nichols law, it is apparent that the complainant will not have to pay under the old law, any more taxes in any particular county other than it would have to pay under the Nichols law. For this reason, the order of injunction will cover the certifications to all the counties, and will be made conditional on the complainant's paying the taxes on its gross receipts from business done within the state of Ohio, in each county, for the year ending May 1, 1893, with interest and penalty, and, when an amendment to the bill showing such payments has been filed, the demurrer will be overruled; otherwise, and unless this amendment is filed within ten days, the bill will be dismissed.

OPINION OF JUDGE TAFT.

Filed in the Circuit Court, November 8, 1894, in No. 337 (Adams Express Case for 1893), and in No. 352 (Telegraph Case for 1893), recalling the opinions of April 23, 1894, to the effect that the Nichols law is unconstitutional. Reported in 64 Fed. Rep. 9.

Western Union Telegraph Company vs. Ebenezer Poe and others.

Adams Express Company vs. Ebenezer Poe and others.

TAFT, Circuit Judge.

In these two cases the bills sought to enjoin the collection of a tax imposed upon the telegraph company and the Adams Express Company under an act of the Ohio legislature, known as the "Nichols Law." A restraining order was issued against the defendants, who were the board of appraisers, appointed under the act to enforce its provisions. The contention in the bill in each case was that the Nichols law was void because it violated the constitution of Ohio and the constitution of the United States. Demurrers were filed to the bills, and on the issue raised by them, the constitutionality of the Nichols law was argued. On April 23d, 1894, this court filed opinions holding that the law was in violation of that clause of the constitution of Ohio which requires that all property shall be taxed by a uniform rule. See 61 Fed. Rep. 449-470. A short time thereafter the supreme court of Ohio gave judgment in a mandamus proceeding in which it sustained the validity of the Nichols law, and held that it was not in conflict with the constitution of Ohio. State vs. Jones, 51 Ohio St. 492. The opinion was not handed down until late in July last. In September the complainants took decrees pro confesso on their bills, the defendants not having answered. The defendants now come into court and make three motions: first, that the decrees pro confesso be set aside (accompanying this motion is an affidavit showing that the defendants have a good defence on the facts, and that their delay in answering was because they intended to file a motion for rehearing in this case, based on the decision of the supreme court of Ohio); second, a motion for rehearing of the demurrer, and third, a

motion for the dissolution of the injunction. The chief controversy on these motions is whether this court should reverse its rulings with reference to the Nichols law because of the subsequent opinion of the supreme court of Ohio. Strenuous objection is made to the granting of the motion because of the character of the suit in which the ruling of the supreme court of Ohio was made. An affidavit is filed to show that the suit was collusive, and that both sides of the controversy were conducted and controlled by counsel for defendants. The facts appear to be as follows: The present suits were two of half a dozen which were brought in this court for the same purpose by different express companies, and the telegraph company. Among them was a suit brought by the National Express Company. The argument on demurrer in all the suits was heard in December of 1893, and the case was re-argued by order of the court on the 23d of March of this year. When the re-argument was ordered the court dismissed the case of the National Express Company as not involving a sufficient amount to give it jurisdiction. As soon as the bill of the National Express Company was dismissed, the attorney-general of Ohio, with his associate counsel, Mr. McDougall, took steps to procure the immediate hearing of a test case before the supreme court of Ohio; and for this purpose it was arranged, with the auditor of Lucas county, that he should refuse to put upon the tax duplicate the amount returned to him by the board of appraisers under the Nichols act, to be levied against the National Express Company. A proceeding in mandamus was then begun in the supreme court of Ohio to compel the auditor to enter the amount assessed on the duplicate. An answer was drawn by the attorney-general to be filed by the auditor, raising the issue of the constitutionality of the Nichols law and making its alleged individuality the ground for his refusal. For this purpose the attorney-general procured Mr. D. K. Watson, a lawyer of Columbus, and formerly an attorney-general of the state, formally to sign his name to the answer of the auditor as his counsel. He then invited Mr. Maxwell, the counsel for the complainant companies in this court, to appear in the supreme court in behalf of the auditor of Lucas county in the litigation thus begun, and to present to the supreme court the considerations upon

which he relied to show that the law was invalid. Counsel for complainants in this court refused to take part in the hearing of the case in the supreme court of Ohio, but made a motion to dismiss the same in that court on the ground that the proceeding was a collusive one and involved a moot question, because, as shown by affidavit the National Express Company had, without controversy, tendered and paid the amount assessed against it to the auditor of Lucas county. The supreme court overruled the motion to dismiss the case and proceeded to the hearing. As Mr. Maxwell refused to appear on behalf of the auditor of Lucas county, in the supreme court of Ohio, Mr. D. K. Watson was regularly employed to represent him and the cause was heard upon printed briefs and oral argument. A considered opinion has been handed down by the supreme court and will appear in the official reports of that court as its judgment upon the question of the validity of the Nichols law under the constitution of Ohio.

In passing upon the question originally, this court expressed its embarassment and hesitation in pronouncing a state law to be invalid because in violation of the state constitution, in advance of a decision by the supreme court of the state. It was fully conceded in that opinion that the supreme court of Ohio was the ultimate tribunal to decide the validity of the state law under the state constitution. This was emphatically laid down by the supreme court of the United States in Pelton vs. Bank, 101 U. S. 143-144. The supreme court of the state has now decided that the Nichols law is constitutional. The case before the court, though the court has overruled a demurrer to the bill on the ground that the Nichols law is invalid is nevertheless still pending in court, and no final decree has been entered therein. It seems to me manifest that it is the duty of this court to reverse its former ruling and make it harmonize with that of the tribunal which has ultimate authority on the subject.

But it is said that the judgment of the supreme court of Ohio was procured by collusion. The facts do not bear out the claim. The opinion of that court was a considered opinion after full argument and the filing of printed briefs. The case was a test case brought before the court in a summary way, as many such constitutional questions are brought there, and

full opportunity was given for argument by counsel interested to invalidate the law. It is doubtless true that the cause was hurried by counsel for the state, because it was properly thought that a decision by the supreme court of the state, the ultimate tribunal upon such questions, would be much more satisfactory for purposes of administering the law throughout the state than any judgment which this court could give. All the facts tending to show the friendly character of the mandamus proceeding and the made-up features of the case were known to the supreme court of Ohio, but that court held that it was not a moot case and that it was one calling for consideration by them. A due respect for the judgments of the supreme court of Ohio makes it indelicate in this court to question the propriety of such a ruling in respect of a case plainly within its jurisdiction. It is pressed upon me that to change my ruling to accord with a subsequent decision of the supreme court of Ohio is to make this court nothing but a tribunal for the registering of the decrees of the supreme court of Ohio. It is the highest duty of a judge or of a court, when shown that its judgment previously expressed is erroneous, to reverse its former ruling, if that be within its power. The question upon which the demurrer turned in this case, as it was argued by counsel and decided by the court, was whether the Nichols law was in violation of the constitution of Ohio. This court thought that it was, for the reasons stated in the opinion filed. Since that time, the supreme court of Ohio has decided differently, and that decision is controlling, as the law of the state, whether this court be convinced of the correctness of the reasoning in that opinion or not. The decision by the supreme court of Ohio that the Nichols law is constitutional makes it so for all practical purposes.

Counsel for complainant contends that his clients are entitled to the independent judgment of this court upon the constitutionality of the law. They are. But that judgment must be based on the controlling authorities which come to the knowledge of the court before its final judgment is entered. In certain exceptional cases it is true that the federal courts do not feel bound to follow the decision of the supreme court of the state construing a state law or constitution. When the issue in a circuit court of the United States concerns trans-

actions between individuals entered into, on the faith of a particular construction of a state law or constitution, and the circuit court enters a decree sustaining the validity of such construction, all before the supreme court of the state has expressed any opinion on the point, the supreme court of the United States will not reverse the decree of the court below if it otherwise approves it, simply because meantime the state court has given the law or the constitution a different construction. This was the principle in Burgess vs. Seligman, 107 U. S. 32. Nor, when transactions have been entered into by individuals on the faith of a certain construction which had been given to a state statute or constitution by the supreme court of the United States, that court will not change its opinion, because subsequent to the transactions involved, the state supreme court has taken a different view. This was the case in Carroll County vs. Smith, 111 U. S. 556. Nor, when different constructions have been given to a statute or a constitution by a state court, are the federal courts bound to follow the later decisions if thereby contract rights which accrued under earlier rulings will be injuriously affected. This principle is established in Douglass vs. County of Pike, 101 U. S. 677; Supervisors vs. United States, 18 Wall. 71, and Rowan vs. Runnells, 5 How. 134.

But the case at bar calls for the application of no such principle. Here is not involved the validity or construction of a law on the faith of which individuals have made contracts, advanced money, or incurred liability. We have here simply a tax law fixing the obligation of artificial persons of a certain class to contribute to the support of the state. In respect of such a law, it would be anomalous and absurd to have a diversity of rulings between the state and the federal courts. The intolerable result of such a diversity would be that companies who could invoke the jurisdiction of the federal court would not pay the tax, while all those who could not invoke that jurisdiction would be compelled to pay it. There is nothing in the decisions of the supreme court of the United States which gives the slightest warrant for supposing that, in the case of a state tax law, it would not follow the decision of the state supreme court, whenever rendered, and however divergent from its own views the conclusion, provided no federal

question was involved. In the State Railroad Tax Cases, 92 U. S. 575, 617, 618, the circuit court of the United States held that a tax of Illinois was invalid because in violation of the state constitution. Before the cases reached the supreme court of the United States on appeal, the supreme court of the state decided that the law was valid. The circuit court decree was accordingly reversed. It is true that in that case the supreme court of the United States concurred with the state court on the merits, but Justice Miller used this language:

"But, if for no other reason, we should reverse the decrees of the circuit court in these cases, because the same questions involving the considerations urged upon us here, have been decided by the supreme court of the state of Illinois in a manner which leads to the reversal of these. * * * As the whole matter, then, concerns the validity of a state law as affected by the constitution of the state, that question and the other one, of the true construction of that statute, belong to the class of questions in regard to which this court still holds, with some few exceptions, that the decisions of the state courts are to be accepted as the rule of decisions for the federal courts. It is, nevertheless, a satisfaction that our judgment concurs with that of the state court and leads us to the same conclusions."

In Bauserman vs. Blunt, 147 U. S. 647; Moores vs. National Bank, 104 U. S. 625, and Green vs. Neal's Lessee, 6 Pet. 291, the supreme court reversed the ruling of the circuit court as to the effect of a state statute of limitation, solely because, after the decision by the circuit court, the supreme court of the state had given the statute a different construction. In Stutzman vs. Wallace, 142 U. S. 293, a case involving the construction of the tax laws of the territory of Dakota, the supreme court of the territory took one view. The case was carried to the supreme court of the United States for review. Meantime the territory had become a state, and the state supreme court, in another case, reversed the ruling of the territorial court. The federal supreme court thereupon reversed the judgment of the territorial court, in deference to the decision of the state court. See also Suydam vs. Williamson, 24 How. 427, and Fairfield vs. County of Gallatin, 100 U. S. 47. For the reasons given, the motion for a rehearing must be granted.

We come now to the question whether if the Nichols law is valid under the Ohio constitution, the demurrers to the bills must be sustained, and the injunction dissolved. The validity of the law under the federal constitution can not be seriously impeached. The only question is whether the facts averred in the bill do not make a case for enjoining the defendant appraisers, on the ground that their assessment is not in accordance with the Nichols law as it is construed by the state supreme court. In the opinion already rendered in these cases (61 Fed. Rep. 463), it was said: "Certain it is that courts will not permit injustice to be done to a class of tax payers by a law which is worded so as to mean one thing to the courts when its validity is attacked, and another thing to the taxing officers when they come to enforce it. Either the law means what the officers construe it to mean, and its validity is to be tested on that construction, or they are to be enjoined from enforcing it except as the courts shall construe it."

This question has not been argued in the light of the supreme court decisions, and I will hear counsel on Saturday, November 10th, at ten o'clock, if they desire to be heard. The clerk will make the proper entries setting aside the decrees pro confesso and granting the motion for a rehearing.

FINAL OPINION OF JUDGE TAFT, DISMISSING THE BILL.

Filed in the Circuit Court, April 8, 1895, in No. 337 (Adams Express case for 1893), and also in Nos. 338, 339 and 340 (the Express cases for 1894).

Adams Express Company vs. E. W. Poe et al.

Taft, Circuit Judge. This case has been twice before the court, and two opinions have been filed. 61 Fed. Rep. 449, 470; 64 Fed. Rep. 9.

The first time it was presented on a demurrer to the bill, and a motion for a preliminary injunction. The bill sought to enjoin the defendants, who had been constituted a state board of assessment to assess the taxable value of telegraph, telephone, and express companies, from certifying their assessments to the various county auditors, on the ground that the law, under which they were acting, was in conflict with the clause of the Ohio constitution which requires all property to be taxed by a uniform rule. This court overruled the demurrer and granted a preliminary injunction, holding that the Nichols law did not violate the uniformity clause of the Ohio constitution. The ground of the ruling was that the board were required to be guided in their estimate of the value of the companies' property, by the market value of their capital stock, which necessarily included elements of value not taxable as property under the Ohio constitution, such as franchises, good will, skill in management, business judgment, and, in case of express companies, contracts with railroad companies for transportation.

Subsequently the supreme court of Ohio held the law to be valid and decided that under the Ohio constitution the elements of value above referred to might properly be considered in assessing the taxable value of the plant and property of the express company. State ex rel. vs. Jones, Auditor, 51 Ohio St. 492.

Upon the announcement of the decision of the Ohio supreme court, a motion was made in this cause to set aside a decree pro confesso, which has been taken, and to rehear the demurrer and the motion for an injunction. These motions

were granted (64 Fed. Rep. 9), and the sufficiency of the bill was then reargued. It was agreed that the facts which had been made to appear by affidavit of the state auditor, in reference to the manner in which the amount of the assessments was reached by the board of assessors, might be considered as incorporated by amendment in the bill, and the question was thus presented, whether conceding the validity of the law, the state board had not enforced it in a mode not permitted by the construction placed on it by the supreme court of Ohio. The rule of law under which the issue arose was stated in the previous opinions in the following language: "Certain it is that courts will not permit injustice to be done to a class of tax payers by a law which is so worded as to mean one thing to the courts when its validity is attacked, and another thing to the taxing officers when they come to enforce it. Either the law means what the officers construe it to mean, and its validity is to be tested on that construction, or they are to be enjoined from enforcing it except as the courts shall construe it."

The return of the Adams Express Company stated the value of its personal property in the state of Ohio to be $53,080.74, the gross receipts of its business done in Ohio to be $175,034.00, the total number of the shares of its capital stock to be $120,000, and the market value thereof to be $16,800,000. In the testimony of its agents before the board, information was given in detail as to the character of the property and business done. In supplementary statements, the value of the total real estate of the Adams Express Company was given as $3,050,272.47, and of the total personal property, as $1,034,481.43. In the schedules attached to and made a part of the returns, are set forth the value of the personal property and the amount of the gross receipts at each office in Ohio at which the company did business. There were included reports as to 363 offices. From two, the personal property was returned at less than one dollar in value, from 72 of them, at one dollar, and from 51 offices at less than two dollars each. No return was made of safes or pouches used on the railway lines. No return was made of the company's contracts or traffic arrangements with railway companies. The averment of the bill as to the elements of value in the market

value of the total number of shares of the capital stock is as follows:

"Your orator further shows unto the court that the scheme of taxation, set forth in said alleged law, while professing to require the taxation of property in the state of Ohio, does not in fact do so, inasmuch as it directs the said board of appraisers and assessors, in ascertaining and assessing the value of the property of express companies in Ohio, to be "guided by" and to "determine the value" of the company's property in the said state, by the value of the company's capital stock, and your orator states that the value of its capital is fixed and determined by the nature, extent, and uses of its property, not only in Ohio, but in many other states of the United States; and by the skill, diligence, fidelity and success with which its business is conducted in all these states; your orator employs many thousands of men, who are constantly engaged as messengers in carrying goods, wares, and merchandise, from one part of the country to another, and otherwise, and its income is largely the result of their efforts; that it owns valuable securities of other companies, and holds valuable contracts and business arrangements with other corporations, and all of these, together with the good will, which it has earned in the course of more than fifty years of service to the public in said business, go to make up the value of the shares of its capital."

The action of the board with reference to assessing the Adams Express Company is shown by its minutes as follows:

"And the board after considering the facts set out in the several returns and supplementary statements, written and oral, of the said express companies and their authorized agents, who appeared before the board, the fact that property in Ohio is ordinarily taxed at not more than two thirds of its actual value, and other facts and evidence duly brought to the knowledge and information of the board, which in the opinion of the board throw light upon the character and value of the property of said express companies, and are calculated to aid the board in arriving at the true value in money of the property of said express companies within this state, on motion the board unanimously fix and determine the value of the property of said several express companies in the state of

Ohio, to be taxed therein as follows: The value of the property of the Adams Express Company in Ohio is fixed at $460,033.08."

The manner of reaching the assessed value of the property of the company in Ohio exclusive of real estate is thus described in the affidavit of the state auditor and one of the members of the board.

"In arriving at the value of the property of these express companies taxable in Ohio, the board did not follow any fixed rule, except the rule that property in Ohio is ordinarily taxed at not more than two thirds of its actual value and the law governing this board. The board considered the facts already stated, set out in the returns and supplementary statements, and also other facts in said returns, and in the testimony of the authorized agents of the companies who appeared before the board. For purposes of comparison the board examined the gross receipts returned by these companies in preceding years. Taking all the information the board had or could secure, the value of the capital stock of the company its gross receipts within Ohio, the return of personal property made, and the character thereof, and evident undervaluations and omissions therein, the number of offices, the amount of the business done, the nature and value of the property and capital required to carry on such business, and other evidence and information, the board, in each instance, ascertained what it considered the fair proportion of the property of the company employed by it in Ohio, and fixed the value of the property of such company situate and taxable therein, being guided in determining the value of the property by the value of the entire capital stock, and other evidence and information before the board."

It is perfectly manifest that what the board of assessors did was not to estimate the tangible personal property of the express company, as it would have been estimated if new and in the store or factory, or on the farm from which it was purchased. The difference between $53,000, the amount in the return, and $460,000, the amount assessed, can not be explained by a failure to return a few traveling safes and pouches, or by any possible undervaluation. The slight amount in value of the company's property returned from

each of its offices is no evidence of fraud, because it is common knowledge that the express company's business, except in the large cities, is done usually with the furniture and in the offices of the railway company whose lines it uses. What the board of assessors really did was to treat as the total taxable personal property of the company, every element, except real estate, which contributes to earn dividends, including tangible personal property, franchises, good will, business skill and judgment, and railway contracts and arrangements. The result was reached by subtracting from the total market value of the capital stock, the value of the real estate, and then apportioning of the remainder, what it regarded a fair and reasonable part to Ohio. Ohio's ratio of the remainder was probably arrived at, by taking the ratio between the tangible personal property in Ohio and the total tangible personal property in the United States as returned for taxation. The total gross receipts in the United States do not seem to have been returned so as to permit an apportionment on the basis of gross receipts. Nor could there have been a mileage apportionment, for no data of the kind were furnished the board. The calculation as it was made must have been something like this:

Total capital stock (market value).....	$16,800,000.00
Less real estate	3,050,272.00
Total taxable personal property.....	$13,759,728.00
Tangible personal property in Ohio returned	53,080.74
Total tangible personal property returned..	1,034,481.43
Chargeable to Ohio 53-1034 of $13,759,728, in round numbers about five per cent of.. or $700,000.	14,000,000.00

For the reason given in the minutes, two thirds of this result was taken as the assessable value of the personal property of the company subject to taxation in Ohio.

The question is therefore whether a method of valuation like the foregoing is permissible under the construction which the supreme court of Ohio has placed on the Nichols law, in upholding its constitutional validity. I think that it is. An examination of the reported decision in the Jones case, cited supra, satisfies me that in the opinion of that court, the entire

plant of express companies taken as a dividend-producing unit machine, and including, as part of it, and as elements of its value, the good will, the business skill with which it is operated, the railway contracts and arrangements and all other value-giving circumstances, may be treated as personal property subject to taxation, and that the part of that unit, which can be fairly considered to be within the taxing jurisdiction of Ohio, arrived at by any reasonable method, is taxable as such in that state.

The board of assessors seem to me to have kept well within this construction of the law. Complainant can only secure the equitable relief it seeks by showing that the excessive valuation claimed arose either from fraud of the assessing officers, or from adopting an unlawful rule of appraisement. Fraud is not charged, and, as we have seen, no unlawfulness appears in the mode of appraisement. Mere errors of judgment in appraisement are not the subject of review here.

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Sixth Circuit, in No. 337 (the Adams Express Co. case for 1893), and in Nos, 338, 339 and 340 (the Adams, American and United States Express Co. cases for 1894). Cases argued June 5, 1895, decided July 15, 1895. Reported in 69 Fed. Rep. 546.

Before Lurton, Circuit Judge, and Severens and Hammond, District Judges.

These suits were brought to enjoin the assessment of taxes against the Adams Express Company for the years 1893 and 1894, the American Express Company and the United States Express Company for the year 1894. The defendants are: Ebenezer W. Poe, auditor of the state of Ohio; John K. Richards, attorney-general of the state of Ohio, and William T. Cope, treasurer of the state of Ohio, and compose a board of tax appraisers for the assessment of telegraph, telephone and express companies, under an act of the Ohio legislature, passed April 27, 1893, and known as the Nichols law. To the several bills demurrers were filed which, on full argument, were finally sustained and the bills dismissed. The complainants have severally perfected appeals and assigned errors.

The ground upon which the suits all proceed is in substance, that the assessments complained of, and the scheme of taxation embodied in the Nichols law under which the assessments were made, are void as in contravention: First. Of the constitution of Ohio, which provides that all property shall be taxed according to its true value in money by a uniform rule, and that the property of corporations shall be taxed "the same as the property of individuals."—Constitution of Ohio, Sec. 2, Art. 12, and Sec. 4, Art. 13. Second. "Of the constitution of the United States, because the effect of the rule of valuation prescribed by the statute, and adopted in these particular assessments, is not to confine the tax to the property of the companies within the state of Ohio, but to tax something else which is not within the state of Ohio, and therefore to take the property of the companies without due process of law; and that the scheme as a special one applied

to these special agencies of interstate commerce, imposes an illegal burden upon that commerce." Third. Complainants also contend that if the Ohio statute be valid under both the constitution of Ohio and of the United States, that the assessments are nevertheless void, because the assessments made were arbitrary and illegal, in that the assessors did not follow the statute or pursue any definite mode of valuation.

Upon a first hearing before Circuit Judge Taft, the demurrers of the defendants were overruled and defendants required to answer. The ground upon which Judge Taft proceeded, was: First, Jurisdiction in equity was predicted upon the ground that a multiplicity of suits would result unless the defendants should be restrained from certifying their assessments to the auditors of eighty-seven counties, within each of which the defendants had property. Second, That the Nichols law, under which the assessments had been made, was void as in conflict with the constitution of the state of Ohio. The opinion of the court upon these questions is reported in 61 Federal Reporter, 449.

Before answers were filed, a suit involving the constitutionality of this legislation was decided by the supreme court of Ohio, and the validity of the law under the Ohio constitution sustained. State, ex rel. vs. Jones, 51 Ohio St. 492.

Upon the filing of this opinion by the Ohio court, Judge Taft granted a rehearing and sustained the demurrer of defendants, upon the ground that the decision of the supreme court of Ohio as to the construction of the Nichols law and its validity under the constitution of Ohio was conclusive upon the courts of the United States. A very convincing opinion upon this aspect of the question was filed, and is reported in 64 Federal Reporter, p. 9. A further argument was heard before Judge Taft upon the question as to whether the state board of assessors had enforced the Nichols law according to the construction placed thereon by the supreme court of Ohio. Upon the latter hearing it was agreed that the bills of the several complainants should be treated as amended by the incorporation therein of the facts which had been made to appear by the two affidavits of the defendant Poe, as to the manner in which the amount of the several assessments had been reached. The learned circuit judge, upon the bills as

thus amended, was of opinion, that the board of assessors had kept "well within the law" as construed by the Ohio court. He, therefore, sustained the demurrers and dismissed the several bills.

After the foregoing statement of the case, the opinion of the court was delivered by Lurton, Circuit Judge.

If the assessments complained of be illegal for any reason, the jurisdiction of a court of equity to enjoin the defendants from certifying them to the several county auditors of the state seems to be clear, upon the ground that a multiplicity of suits would result unless the assessments be enjoined before the assessors shall certify to each county auditor the proportion of the gross assessments collectable by each county auditor under the scheme of apportionment among the counties provided by the act. To require the complainants to pay each of the numerous county auditors and then sue to recover, or to enjoin each, would be most oppressive. We think, therefore, that the jurisdiction asserted in the bill of avoiding a multiplicity of suits was a sufficient ground to support the original bill, as well as the bills subsequently filed to enjoin the tax of 1894, assessed after the jurisdiction in the original case had attached.

Cummings vs. Nat. Bank, 101 U. S. 153-157.
State Railroad Tax Cases, 92 U. S. 575-618.
Pacific Express Co. vs. Siebert, 142 U. S. 339-348.
Shelton vs. Platt, 139 U. S. 591-599.
Marshall vs. Holmes, 141 U. S. 589.
Adams Express Co. vs. Poe et al., 61 Fed. Rep. 449.

The question as to the constitutionality of the Nichols law under the Ohio constitution must be regarded as conclusively settled for this court by the opinion of the highest court of the state of Ohio, as announced in the case of State, ex rel. vs. Jones heretofore cited.

The objection that this court ought not to feel precluded by the opinion of the Ohio court by reason of the made up character of the suit in which that opinion was announced, is not satisfactory. It is true that the circuit court of the United States first obtained jurisdiction of the question as to the validity of the Nichols law under the constitution of Ohio, and that that court in a very vigorous and persuasive opinion

concluded that the Nichols law contravened the constitution of Ohio, and was, therefore, invalid. The courts of Ohio had not theretofore passed upon the question, and the circuit court could not escape the duty of determining for itself the true meaning and construction of the constitution of Ohio, so far as involved by the mode of assessment provided by the Nichols law. Before a final decree had been rendered, the supreme court of Ohio, in a case involving the validity of the same law, announced a contrary opinion and held the Nichols law, as construed by the same court, an entirely valid law, so far as it was supposed to be affected by the state constitution. Under the circumstances of this case, we think the duty of the circuit court was to accept the opinion of the Ohio court as conclusive, and to render judgment accordingly. The case before it involved no rights or contracts between individuals which had been entered into upon the faith of earlier and conflicting decisions of either the courts of the United States or of the state, and, therefore, presented no question such as arose in Burgess vs. Seligmon, 107 U. S. 32, or Carroll County vs. Smith, 111 U. S. 556, or Douglass vs. County of Pike, 101 U. S. 677, and Rowan vs. Runnells, 5 How. 134.

Where the construction or validity of a state statute does not involve rights acquired upon the faith of earlier and conflicting decisions, it is the clear duty of federal courts to accept and adopt the decisions of the highest court of a state in respect to the construction and conformity of state laws to the constitution of the state. The decision of such questions properly belong to the highest courts of the state. We entirely concur with the opinion of the circuit judge upon this question, who said:

"Here is not involved the validity or construction of a law on the faith of which individuals have made contracts, advanced money, or incurred liability. We have here simply a tax law fixing the obligation of artificial persons of a certain class to contribute to the support of the state. In respect of such a law, it would be anomalous and absurd to have a diversity of rulings between the state and federal courts. The intolerable result of such a diversity would be that companies who could invoke the jurisdiction of the federal court would not pay the tax while all those who could not invoke that

jurisdiction would be compelled to pay it. There is nothing in the decisions of the supreme court of the United States which gives the slightest warrant for supposing that, in the case of a state tax law, it would not follow the decision of the supreme court, whenever rendered, and however divergent from its own views the conclusion, provided no federal question was involved. In the State Railroad Tax Cases, 92 U. S. 575, 617, 618, the circuit court of the United States held that a tax law of Illinois was invalid because in violation of the state constitution. Before the cases reached the supreme court of the United States on appeal, the supreme court of the state decided that the law was valid. The circuit court decree was accordingly reversed. It is true that in that case the supreme court of the United States concurred with the state court on the merits, but Justice Miller used this language: "But if, for no other reason, we should reverse the decrees of the circuit court in these cases, because the same questions involving the considerations urged upon us here, have been decided by the supreme court of the state of Illinois in a manner which leads to the reversal of these * * * As the whole matter, then, concerns the validity of a state law as affected by the constitution of the state, that question and the other one of the true construction of that statute belong to the class of questions in regard to which this court still holds, with some few exceptions, that the decisions of the state courts are to be accepted as the rule of decision for the federal courts. It is, nevertheless, a satisfaction that our judgment concurs with that of the state court and leads us to the same conclusions."

In Bauserman vs. Blunt, 147 U.S. 647; Moores vs. National Bank, 104 U. S. 625, and Green vs. Neal's Lessee, 6 Peters, 291, the supreme court reversed the ruling of the circuit court, as to the effect of a state statute of limitation solely because after the decision by the circuit court, the supreme court of the state had given the statute a different construction. In Stutzman vs. Wallace, 142 U. S. 293, a case involving the construction of the tax laws of the territory of Dakota, the supreme court of the territory took one view. The case was carried to the supreme court of the United States for review. Meantime the territory had become a state and the

state supreme court reversed the ruling of the territorial court. The federal supreme court thereupon reversed the judgment of the territorial court in deference to the decision of the state court. See also Suydam vs. Williamson, 24 How. 427, and Fairfield vs. County of Gallatin, 100 U. S. 47."

The suggestion that the opinion of the Ohio court should now be followed because the suit in which it was announced had many features of a moot court case, can not be seriously entertained. The facts do show that a case was made up for the purpose of obtaining the opinion of that court in as summary a way as possible, and that it was intended as a test case. The facts now relied upon to destroy the effect of the decision were also made known to the Ohio court. The conclusion that court reached was that the case was one fairly under its jurisdiction, and that the validity of the Nichols law under the Ohio constitution was presented in a way to give jurisdiction and demand decision. That it was in reality a friendly suit, does not detract from the weight of the court's opinion as an opinion. The case was argued and duly considered. Opportunity was given the present able counsel, then and now representing the complainants, to appear and argue the case. We think that due respect for the high tribunal who heard and decided the case require that we shall accept its judgment that the case was not a moot case, but one entitled to be heard and decided. This was the conclusion of the circuit court, and meets our approval.

Being of opinion that the decision of the supreme court of the state removes from this case all questions of conflict between the act and the constitution of the state, there remains for consideration the question as to whether there is in the act, as construed by the state court, or as administered, any violation of rights secured by the federal constitution to the complainants. The law under which the assessments complained of were made, is entitled: "An Act to amend and supplement sections 2777, 2778, 2778a and 2780 of the Revised Statutes of Ohio." Section 2778a is the only one which needs to be set out, and is as follows:

"Sec. 2778a. Every express, telegraph and telephone company embraced in section 2777, whether chartered by the laws of this state, or by any other state or country, doing

business in this state, shall, annually, between the first and tenth day of May, return to the auditor of state, under the oath of its treasurer, the amount of its capital stock, its place of business, the par value and market value (or if there be no market value, then the actual value) of its shares at the time of said return. The return shall also contain a statement in detail of the entire real and personal property of said company, and where located, and the value thereof as assessed for taxation; the telegraph and telephone companies shall, in addition thereto, return the whole length of their lines, and the length of so much of their lines as is without and as is within the state of Ohio, which lines shall include what said telegraph and telephone companies control and use under lease or otherwise; and said board of appraisers and assessors shall, in determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, be guided by the value of said property as determined by the value of the entire capital stock of said company, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio, in the proportion which the same bears to the entire property of said company, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid. Express companies shall, in making said returns, include therein, as a part thereof a statement of their entire gross receipts for the year ending the first day of May, of the business done within the state of Ohio, giving the receipts of each office in said state, and the location thereof for said year."

By Section 2780b, the assessors are required to deduct from the total value of the property of said companies as ascertained and determined by section 2778, the valuation of any and all real estate as assessed for taxation, situate in the state, and on which said companies pay taxes.

All of the complainant companies are corporations of states other than Ohio, and each has its principal office in other states. The questions presented by each separate bill are in substance the same. For purposes of convenience we shall consider the averments in the bill of the Adams Express Company, as presenting substantially the ground for relief

made by each of the other complainants. That bill avers that much the greater part of its business done in Ohio is in the transportation of goods, wares and merchandise from points within the state to points in other states, and from points without the state to points within. That it owns no line of railroad in the state of Ohio, but conducts its business under contracts with the owners of such railroads. That it owns no real estate in the state, except such as is used for stabling horses used by them in the collection and distribution of goods, wares and merchandise; and that the personal property within the state consists entirely of office furniture and tools, horses and wagons; that the actual cash value of its personal property in the state of Ohio in 1893, did not exceed the sum of $53,500.00; and that the total value of its real estate within the state does not exceed $25,170.00; and that all taxes on this real property have been paid; that the assessment for 1893 made against the said company was $460,033.38; that the whole number of shares in the said company is one hundred and twenty thousand, and that the market value of the shares ranged during the year preceding from $1.40 to $1.50 upon the dollar, a price which the bill avers is greatly in excess of the actual value of all the property of said company.

It avers that the scheme of taxation set forth in the act, "while professing to require the taxation of property in the state of Ohio, does not in fact do so, inasmuch as it directs the said board of appraisers and assessors, in ascertaining and assessing the value of the property of express companies in Ohio, to be "guided by" and to "determine the value" of the company's property in the said state "by the value of the company's capital stock." It also alleges that the value of its capital is fixed and determined by the nature, extent and uses of its property, not only in Ohio, but in many other states of the United States; and by the skill, diligence, fidelity and success with which its business is conducted in all these states; that it employs many thousands of men who are constantly engaged as messengers in carrying goods, wares and merchandise from one part of the country to another, and otherwise, and that its income is largely the result of their efforts; that it owns valuable securities of other companies, and holds valu-

able contracts and business arrangements with other corporations, and all of these, none of which are held and owned in the state of Ohio, and many of them not taxable at all together with the good will which it has earned in the course of more than fifty years of service to the public, in said business, go to make up the value of the shares of its capital."

It further complains that the act does not provide a method for taxation of property according to its true value in money, "but is really an attempt to enforce against express, telegraph and telephone companies, the payment of a tax for the privilege of doing business within the said state by placing a fictitious value upon their property." "That the said pretended law is a tax upon interstate commerce, inasmuch as it attempts to establish an artificial and fictitious basis for the valuation for taxation of the property of your orator in this state, a valuation which is determined by the value of its property in other states and by reference in part to its earnings and gains in this state from business which is largely inter-state." That in making the assessment complained of the assessors "were guided by the value of one share of your orator's capital, and in all other respects as directed by the act."

In conclusion the bill avers that the method of taxation is unfair, unjust and unequal, "inasmuch as it requires your orator to pay taxes in Ohio upon property situated in other states upon which it pays taxes according to its value, and upon its gains and earning in localities outside of the state of Ohio, in which its gains and earnings are very much larger than those derived from an equal number of miles of line operated by it in Ohio."

By amendment the minutes of the board and an affidavit of E. W. Poe, one of the board and a defendant, were incorporated as parts of the bill. From these it appears that the complainants had actual notice of the meetings of the board, appeared and explained their returns and were heard by counsel; that in the testimony of the agents of complainants information as to the character in detail of the property of these companies in the state and the character of the business done, was laid before the board; and that supplementary statements were filed (not under oath) showing that the total value of the real estate of the Adams Express Company was $3,050,272.-

47, and of the personalty, $1,034,481.43; and that the total value of the real estate of the American Express Company was $4,956,585.63, and of its personalty $1,742,402.04. No statement as to the total value of the realty or personalty of the United States Express Company was given. By schedules filed, the value of the personal property at each office in the state was given, and the gross receipts from business done in the state at each office was also shown. This affidavit further sets out that:

"In the statement of the Adams Express Company were included reports from 363 offices. From two of these offices the personal property was returned at a value of less than $1.00; from 72 offices the personal property in each instance was returned at a value of over $1.00; from 51 offices the personal property was returned at a value of over $1.00 and under $2.00. Thus from 125 offices of the Adams Express Company the personal property was returned at less than $2.00. In the statement of the American Express Company, there were reports from 302 offices, and from but 46 of these offices was there any return of personal property. In the statement of the United States Express Company, there were reports from 417 offices and from only 95 of these offices were there any returns of personal property. Neither of the Express Companies made any return of safes, pouches or other personal property or the value thereof, used on the railroad lines in this state in the transaction of its business. In arriving at the value of the property of these express companies taxable in Ohio, the board did not follow any fixed rule, except the rule that property in Ohio is ordinarily taxed at not more than two thirds of its actual value, and the law governing this board. The board considered the facts, already stated set out in the returns and supplementary statements, and also other facts in said returns and in the testimony of the authorized agents of the companies who appeared before the board. For purposes of comparison, the board examined the gross receipts returned by these companies in preceding years. Taking all the information the board had or could secure, the value of the capital stock of the company, its gross receipts within Ohio, the return of the personal property made and the character thereof and evidence of undervaluations and

omissions therein, the number of officers, the amount of business done, the nature and value of the property and capital required to carry on such business and other evidence and information, the board in each instance, ascertained what it considered the fair proportion of the property of the company employed by it in Ohio, and fixed the value of the property of such company situate and taxable therein, being guided, in determining the value of the property by the value of the entire capital stock, and other evidence and information before the board."

There is no ground for complaint that the assessments were made without due process of law. The complainants had notice of the time and place where the board would meet, and were required to make a sworn return of their property. The time and place were fixed by the law, and its sessions were not secret. In State ex rel. vs. Jones, heretofore cited, the Supreme Court of Ohio construed the act as entitling the companies "to be present and explain the statement rendered of its property and the value thereof." They did, in fact, appear, and offered evidence and were heard by counsel. This right to appear and be heard is due process.

Kentucky Railroad Tax Cases, 115 U. S. 321.
State Railroad Tax Cases, 92 U. S. 575.
Pittsburgh, C. C. & St. L. Ry. vs. Backus, 154 U. S. 421.

The act is assailed upon the suggestion that it permits and requires the assessment and valuation of property outside the state. This contention is based largely upon the theory that the law imposes upon the assessors the arbitrary duty of estimating the value of the property owned by these companies as equal to the market value of its capital stock, and the further duty of apportioning to the state of Ohio that proportion of the total capital stock which the value of its personal property in Ohio bore to the total value of its personal property wherever situated. It must be confessed that the principal rule of assessment has been most obscurely drawn. Whether this was done that it might be read one way by the assessors and another by the courts, is somewhat problematical. But the act in its most important feature has been construed by the Supreme Court of Ohio in State ex rel. vs. Jones, and that con-

struction must be now read into the act and accepted as conclusive as its meaning by this court. That court upon this point, said:

"The board, in determining the value of the company's property in this state for taxation, is not required to fix the value of such property upon the principle that the value of the entire property of the company shall be deemed the same as the value of its entire capital stock, thus making the respective values equivalents of each other. But taking the market value of the entire capital stock as a datum, the board is to be only guided thereby in ascertaining the true value in money of the company's property in this state. The statute does not bind the board to find the value of the entire property of the company equal to that of the entire capital stock. While the value of the property may be less, there may be cases, and not uncommon, in which the value of the property will exceed the market value of the capital stock."

The value of its capital stock under the act, as thus construed, was but one of the factors to be looked to in estimating the total value of the property owned by the companies. The board might conclude, on all the evidence, that the property was of a greater or less value than its capital stock, and there is nothing in the act which arbitrarily requires the assessors to ignore "the other evidence" which the law contemplated they would look to, and find according to the fact. As construed by the Ohio court, the act required the assessors to ascertain the value of the property of all the companies to be assessed by the special board which was "within the state." In the opinion of that court the provisions of the law which required the board to regard the entire property of such companies wherever situated as one entire plant, and as "a dividend producing unit machine," was not obnoxious to the constitution of that state nor to any provision of the constitution of the United States. It was also of opinion, that the fundamental law of Ohio was not contravened by treating as elements in making up the gross value of such a unit plant, good will, business skill, contracts with railway or other carriers, and every other business consideration which contributed to the successful and profitable operation of the manifold parts of so complicated a machine. Neither was it

objectionable that the value placed by the general public upon the capital stock of such companies, as indicated by sales of shares on the open market, should be looked to as a guide in fixing the total value of the property of such companies wherever situated. That court was also of opinion that the money value of that part of this unit plant found within the state was within the taxing jurisdiction of Ohio.

Accepting, as we feel constrained to do, the opinion of the Ohio court as to the construction to be placed upon the provisions of the Ohio constitution concerning uniformity of taxation and admissible methods for assessing the property of corporations, and accepting also the construction of this Nichols law as settling the meaning of the legislature, we are unable to see wherein any provision of the constitution of the United States has been infringed. The law does not discriminate between domestic corporations and those of states other than Ohio. There was due process of law in the ascertainment of values. The bill does not charge any actual fraud upon the part of the assessors. Mere excessiveness of valuation, not the result of intentional or reckless willfulness, and not a consequence of a departure from the affirmative provisions of the law regulating such assessments, is not remediable by application to courts of equity. The tax imposed is not a license tax, nor a tax on the business or occupation, nor on the transportation of property through the state, nor from points within the state to points in other states, nor from points in other states to points within the state. It purports to provide for a tax upon property within the state of Ohio. Though this property is employed very largely in the business of interstate commerce, yet that does not exempt it from liability to taxation as all other property within the jurisdiction of Ohio. This proposition is too well settled to need argument.

Delaware Railroad Tax, 18 Wall. 232.
Western Union Tel. Co. vs. Massachusetts, 125 U.S. 530-549.
LeLoup vs. Mobile, 127 U. S. 640-649.
Pullman Car Co. vs. Penn. 141 U. S. 18-23.

Neither does the fact that the property of the express companies was valued as a unit profit producing plant violate any

federal restriction upon the taxing power of a state within which a part of that plant is found. The value of property depends in a large degree upon the use to which it is put. If a railroad may be valued as a unit, rather than as a given number of acres of land, plus so many tons of rails and so many thousand ties and a certain number of depots, shops, etc., there is no sufficient reason why the property of an express company should not be treated as a unit plant. If the state of Ohio had a right to tax the property within the state, and to assess it at its true cash value, there is no federal restriction which will prevent such property from being "assessed at the value which it has, as used, and by reason of its use."

Pittsburg, etc., R. R. vs. Backus, 154 U. S. 431.
Western Union Tel. Co. vs. Mass., 125 U. S. 530.
Pullman Car Co. vs. Penn., 141 U. S. 18.

That an express company owns no line of railway, and operates no railroad does not prevent the value of its property from being affected by the relation of each part to every other part, and the use to which a part is put as a factor in a unit business. The Pullman Car Company neither owned nor operated any line of railroad. Its cars were moved by railway carriers under contracts, yet it was not regarded as violative of any federal restriction that its property should be regarded as a unit plant, with a unit value, and the value of its property in Pennsylvania assessed in the proportion that the mileage of the roads over which its cars ran in that state bore to the total mileage covered by its entire business.

Pullman Car Co. vs. Penn., cited above.

Neither is it an objection that the Ohio law required the assessors to look to the value of the capital stock of the company as a factor in arriving at the value of its whole property considered as a unit plant. In State Railroad Tax Cases, 92 U. S. 675-605, Mr. Justice Miller said:

"When you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for all these are represented by the value of its bonded debt, and the shares of its capital stock."

This language is quoted with approval in Pittsburg, etc., R. R. Co. vs. Backus, 154 U. S. 429.

It may be that in a particular instance this would operate with injustice, but that it is a proper matter to be considered, is not to be controverted. As construed by the Ohio court, this act does not require the assessors to find that the value of the property of such a corporation is the precise equivalent of the value of its capital stock as ascertained by the rule stated above. The board were only required to treat the value of the capital stock as a guide in ascertaining the actual value of its property.

In view of the wealth, population and area of Ohio, it is not a violent presumption that the value of the part of such a plant within that state was in the proportion that the actual value of its tangible property in Ohio bore to the total value of all its tangible property wherever situated. The mileage basis of apportionment has been sustained where railroads, telegraph and sleeping car companies were the subject of assessment for taxation.

Pittsburg, etc., R. R. Co. vs. Backus, 154 U. S. 431, and other cases heretofore cited.

A mileage basis was not adopted by the assessors whose action is now complained of, because the express companies failed to return the datum asked for by the assessors. Precisely what rule the assessors did adopt in apportioning the total value, does not clearly appear, though the inference is strong that the distribution was made largely on the basis of the relative value of tangible property in Ohio to the total value of all the tangible property owned by the complainants.

It may be that under exceptional circumstances a rule of apportionment based on mileage or upon the relative value of the local tangible property as compared to the total value, or based upon gross receipts within the state, as compared to total gross receipts, would be inequitable and unjust. Speaking of objections to an apportionment on a mileage basis, Mr. Justice Brewer, speaking for the court in Pittsburg, etc., R. R. Co. vs. Backus, 154 U. S. 431, said:

"It is true, there may be exceptional cases, and the testimony offered on the trial of this case in the circuit court tends to show that this plaintiff's road is one of such excep-

tional cases, as for instances, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock. If testimony to this effect was presented by the company to the state board, it must be assumed, in the absence of anything to the contrary, that such board in making the assessment of track and rolling stock within the state, took into account the peculiar and large value of such facilities, and such extra rolling stock. But whether in any particular case such matters are taken into consideration by the assessing board does not make against the validity of the law, because it does not require that the valuation of property within the state shall be absolutely determined upon a mileage basis."

The valuation of the returned personal property of the Adams Express Company for 1893 was $53,500.00, and the assessed value as determined by the board is $460,033.08. This great increase undoubtedly casts a shadow on the action of the board. Still, the bill, including the amendments incorporating the affidavits of Auditor Poe as a part thereof, does not charge any actual fraud on the part of the board, by intentionally and deliberately placing a valuation grossly in excess of the real value, for the purpose of compelling the complainants to bear a larger share of taxation than it rightfully should. As in the case last cited, it may be said, "that the most that can be made out of the bill is a complaint that the assessment is too high, because the board took into consideration property outside of the state, and gave to the property within the state a value partly deduced from that without the state."

But if it was lawful to value the whole plant looking to it as a unit, and looking to the market value of the capital stock as a factor in the ascertainment of that total value, and that such a method does not contravene the constitution or law of Ohio, then it would seem to follow, in the absence of specific charges of fraud, or of a departure from the method of appraisement indicated by the law, that a court of equity

is without power to relieve against a mere excessive valuation. Clearly a court of equity will not, in the absence of fraud or violation of law, enjoin an assessment merely upon allegations of excessiveness.

What we have said as to the case made by the Adams Express Company, is equally applicable to the suits of each of the other express companies, there being no material difference in the averments of the several bills.

Our conclusion must be, therefore, that neither the law nor the assessment thereunder is obnoxious to either the constitution of Ohio nor any federal restriction, and the decree of the circuit court dismissing the several bills must be affirmed.

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Sixth Circuit, in No. 352 (the Telegraph case for 1893). Case argued June 5, 1895. Decided July 15, 1895. Reported in 69 Fed. Rep. 557.

Before Lurton, Circuit Judge, and Hammond and Severens, District Judges.

This is one of a series of bills filed by corporations of states other than Ohio to enjoin assessments for taxation under a law of Ohio, passed April 27, 1893, and known as the Nichols law, for the taxation of telegraph, telephone and express companies. The facts averred in this suit are substantially like those stated and considered in the opinion of this court filed at this term in the case of Henry Sanford, President of the Adams Express Company, vs. Ebenezer W. Poe, Auditor of the State of Ohio, et al., except that the complainant is a telegraph company, while the suits disposed of by the opinion referred to were the suits of express companies.

Complainant avers that the entire value of its property in the state of Ohio, May 1, 1893, did not exceed $647,000.00, and that it has been assessed for 1893 on a valuation of $2,011,076.45, "wrongfully pretending that said sum is named as being the value of its property in the state of Ohio."

The bill avers that the complainant is the owner of lines of Atlantic cable extending to Cuba and to England, and connecting in England with lines of other companies extending to all parts of Europe, and lines in Canada; and that the total number of miles of lines owned or operated by it is 189,576; and that the length of its mileage in Ohio is 8,272. It further states that, "the cash value of its property can not be ascertained, even approximately, by applying the proportion which its lines in Ohio bear to the whole number of miles owned or operated by it, upon a valuation of all the shares of its capital stock, because such valuation includes elements of value not existing within the state of Ohio, and not taxable within said state, and some of which are not taxable at all, and because the lines owned and operated by it are not of uniform value per mile, either as to gross or net income earned upon

the various lines, or as to the cost of construction and maintenance. Your orator owns thousands of miles of ocean cable which cost about $4,000 per mile, while the ordinary cost of the lines in Ohio is about $103.60 per mile. The cost of the company's lines in the more densely settled portions of the country, as in Massachusetts, New York, Pennsylvania and New Jersey, where also the company's trunk lines are larger, is very much greater than in Ohio. The income arising from the conduct of your orator's business is much greater, in many of the states, per mile of line, than in the state of Ohio, and the average income per mile in the entire system is very much greater than that of the lines in Ohio.

Your orator further shows that the market price of its stock affords no fair, reasonable or just method of forming an opinion as to the value of its property, or, of fixing a basis of value for the taxation thereof, inasmuch as the said market price is speculative and variable, and is dependent upon financial and other conditions, not at all connected with your orator, its business or its property while the actual value of its shares is made up of property of various kinds, in various states, and of valuable contracts with railroad companies and other companies and individuals; of franchises granted by the government of the United States, by the Act of July 24, 1866; of franchises granted by other states and municipalities in them, and by foreign governments; of patent rights; of business experience, good will and skill employed in the prosecution of its business; of investments in bonds and stocks of other corporations aggregating $7,633,230.12, and large investments of real estate in New York City and Chicago, and in other cities and towns outside of Ohio, aggregating more than five millions of dollars in value."

The bill then charges:

"That while by the terms of said law the appraisement made by said board is designated as an appraisement of the value of the property of express, telegraph and telephone companies in the state of Ohio, it is not such in fact, but is, in truth, an attempt to levy a tax against such companies including your orator, for the privilege of doing business in the state of Ohio; that the property of all individuals in Ohio, and of all companies in said state, other than express, tele-

graph and telephone companies, is assessed in said state by ascertaining its true value, by uniform rule, as required by the constitution of said state, and that the property of the said companies should be assessed in the same manner, that is to say, by a verified return of such property in each county in which any part thereof is situated, such return setting forth the designation, amount and value of said property; that the property of your orator in said state is of the simplest character, plainly open to observation and investigation as to its value, consisting only of poles, wires, instruments and office furniture used in telegraphy, and there is no just or lawful reason for assessing its property in any mode or manner other than that employed generally under the laws of said state, and your orator further says that an attempt to fix a value upon its poles, wires, instruments and office furniture, by consideration of the property which it owns and the advantages which it enjoys and the business which it does in other states and countries, is unjust, unfair, oppressive, and is not permissible under the constitution of Ohio, and that of the United States."

By amendment, two affidavits of defendant Poe, concerning the procedure of the board in arising at the valuation for assessment, were incorporated as amendments to the original bill. Included in this amendment is the minute of the board containing its finding of facts and conclusion as to the value of the plant of the complainant company in Ohio, from which it appears, that on May 1, 1893, the capital stock of the Western Union Telegraph Company was $94,000,820.00; the par value of its shares was $100.00 each, and the market value $87.00; that the value of the entire capital stock was on that day $81,780,713.40. The assessors then deducted from this total valuation $7,633,230.12, the value of stocks and bonds of other corporations owned by complainant, and also deducted $5,013,326.64, the value of real estate owned by it outside of Ohio, leaving $69,134,156.64, as the value of the lines owned or operated by it. The board further found that the whole length in miles of the lines of said company, both within and without the state, was 189,576, and the length of such lines in Ohio was 8,272 miles. The minute concludes as follows:

"That the proportion of the entire value of the capital stock of said company employed in business in Ohio and represented by property taxable therein, was, on said first day of May, 1893, 8272-189576 of $69,134,156.64, which equals $3,016,614.67."

On consideration of the foregoing, the fact that property generally in Ohio is taxed at not more than two thirds of its actual value, the statement in the return of the company that to reproduce the lines in this state will cost the sum of $1,649,279.10 (which the board regards as an insufficient estimate, and at any rate, much below the existing value of said lines as an entirety) and other facts and evidence contained in the return of the company and otherwise, brought to the attention of the board, on motion, the board unanimously fix and determine the value of the property of the Western Union Telegraph company in the state of Ohio to be assessed and taxed therein, at the sum of $2,011,076.45."

There is no averment that the defendants were guilty of any fraudulent purpose in making the valuation complained of as excessive.

The circuit judge after overruling the demurrer filed by the defendants, upon the ground that the Nichols law contravened the constitution of Ohio and was, therefore, void, subsequently granted a rehearing, the supreme court of Ohio having in the meantime decided that the Nichols law was valid and not obnoxious to any provision of the constitution of Ohio. See:

State ex rel. vs. Jones, 51 Ohio St. 492.

Upon this rehearing the circuit court sustained the demurrers of defendants and dismissed the bill. The opinions of Judge Taft are reported in 64 Federal Reporter, p. 9, and 61 Federal Reporter, p. 449.

From this statement of the facts it is evident that the case of this complainant is completely controlled by the opinion of this court in the case already referred to of Sanford vs. Poe et al., which was heard along with the present suit and the case of West. Union Tel. Co. vs. Mass., 125 U. S. 530. It is accordingly ordered that the decree of the circuit court dismissing the bill of the present complainant be affirmed.

SUPREME COURT OF OHIO.

State ex. rel. vs. Jones, Auditor. Reported in 51 Ohio. St. 492. Constitutionality of the Nichols Law.

1. An act to amend and supplement sections 2777, 2778, 2779 and 2780, of the Revised Statutes of Ohio, passed April 27, 1893 (90 Ohio Laws, 330), and known as the Nichols law, is not in conflict with section 2 of article 12 of the constitution, which provides that: "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all real and personal property, according to its true value in money;" and is a valid law.

2. The act of April 27, 1893, is not in violation of section 16 of article 1 of the constitution, which provides that: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law;" nor, in violation of the 14th amendment of the Federal Constitution, which provides that no "state shall deprive any person of life, liberty, or property, without due process of law."

Petition filed March 19, 1894; case argued April 12, 1894; decided May 1, 1894.

MANDAMUS.

On April 27, 1893, the general assembly of this state passed an act known as the Nichols Law, to amend and supplement sections 2777, 2778, 2779 and 2780, of the Revised Statutes of Ohio (90 Ohio L. 330).

Section 2777 defines express, telegraph and telephone companies.

Section 2778 constitutes the treasurer, attorney-general and auditor of state "a board of appraisers and assessors for such express, telegraph and telephone companies." The auditor is made president, and is to appoint the time and place for the meeting of the board. The board is required to appoint one of its members secretary and keep full minutes of its proceedings.

"It shall be the duty of such board to meet in the month of May, in the present and each succeeding year at such time as the president shall appoint."

"Said board shall proceed to ascertain the entire amount and value of the personal and real property of said express, telegraph and telephone companies."

The board shall have power to require from the officers of such companies "a detailed statement under oath of all the items and particulars constituting such property, moneys, credits, and the value thereof," and may inspect books and papers, and examine officers and agents under oath.

The board shall report annually, "on or before the first Monday in the month of June," to the auditor of state,

(a) "The total value of the property of said companies,

(b) "The value assessed against said companies for their property in the state of Ohio,

(c) "The distribution of the same as hereinafter provided."

All of which shall by the auditor of state be communicated to the general assembly with his annual report.

The board shall have all the powers possessed by county auditors under sections 2781 to 2785 inclusive, and the companies are made subject to the provisions and penalties of said sections.

Section 2778a provides that each of these companies, "whether chartered by the laws of this state or any other state or country," shall annually, between the first and tenth days of May, return to the auditor of state:

1. The amount of its capital stock.

2. Its place of business.

3. The par value and market value (or, if there be no market value, then the actual value) of its shares at the time of said return.

4. A statement in detail of the entire real and personal property of said companies and where located, and the value thereof as assessed for taxation.

5. Telegraph and telephone companies shall, in addition thereto, return the whole length of their lines, and the length of so much of their lines as is without and is within the state of Ohio, including the lines controlled and used, under lease or otherwise.

6. Express companies shall include in the return a statement of their entire gross receipts for the year ending the first day of May, of the business done in the state of Ohio, giving the receipts of each office in the state and the location thereof.

The board, in determining the value of the property of said companies in Ohio, to be assessed and taxed within the state, shall "be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio, in the proportion which the same bears to the entire property of said corporations, as determined by the value of the capital stock thereof, and other evidence and rules as aforesaid."

Section 2779 provides penalties for failure on the part of officers of such companies to attend or testify before the board.

Section 2780 regulates the apportionment of the valuations found of the property of telegraph and telephone companies among the several counties. The board is required to apportion the valuation among the several counties through which the lines run in the proportion that the length of the lines in the respective counties bear to the entire length in the state. The amount apportioned is to be certified by the board to the county auditor and the county auditor apportions the amount among the cities, villages, townships, and other taxing districts.

"The auditor shall put the same (meaning the apportioned valuation) on the tax list to be assessed, and the taxes thereon collected the same as taxes assessed and collected on other personal property. And the rate of taxation shall be the same as that assessed against real and personal property in said cities."

Section 2780a provides for the apportionment of valuations of express companies among the several counties in which they do business in the proportion that the gross receipts in each county bear to the gross receipts in the state. The board is to certify its valuation to the auditor; the auditor is to apportion the amount for the county to the taxing districts therein, and there is the same provision as to placing the apportioned valuation upon the tax list and subjecting it

to the local rate of taxation, as in section 2780, relating to telegraph and telephone companies.

Section 2780b provides that these companies shall not be required to make returns under section 2744, governing the returns and the appraisements or assessments of corporations generally; and, further, that the valuation of all real estate of the companies situated in this state shall be deducted from the total valuation of the property of the companies, as fixed by the board.

The board duly apportioned the valuation of the property in Ohio of The National Express Company—a foreign corporation—among the several counties of Ohio in which said express company did business, apportioning $754.00 to Lucas county, and certifying that amount to the defendant, Charles H. Jones, as auditor of that county; but said auditor refused to apportion the amount so certified to him among the cities, villages, townships and districts in Lucas county, and to put the same on the tax list of said county to be assessed and taxes thereon collected, as on other personal property.

Thereupon this proceeding in mandamus was brought by the board to compel said auditor so to do.

The petition avers that the suit is brought on the relation of Ebenezer W. Poe, auditor of state, John K. Richards, attorney-general, and William T. Cope, treasurer of state, of the state of Ohio. That they, as such officers, constitute the board of appraisers and assessors for express, telegraph and telephone companies in the state of Ohio, under the act of April 27, 1893; that acting under and by virtue of authority conferred upon them by said act, they, as such board, prior to the 22d day of November, 1893, duly fixed and determined the value of the property of the National Express Company in Ohio for the year 1893, to be taxed therein, at the sum of $9,450.00; that acting in accordance with the provisions of said act, they duly apportioned the valuation of the property of said express company among the several counties in Ohio, in which said express company did business, apportioning to Lucas county, Ohio, the sum of $754.00; that said petitioners certified to the defendant, Charles H. Jones, as auditor of Lucas county, the foregoing amount apportioned to his county, of the total valuation of said express company in

Ohio; that the defendant received said certificate, and that, thereupon, it became and was and is his duty, as auditor of Lucas county, to apportion said sum of $754.00 among the cities, villages, townships and districts, or parts thereof, in Lucas county, and to put the same on the tax list of Lucas county to be assessed as taxes, and collect the same as taxes assessed and collected on other personal property, and the rate of taxation to be the same on said apportioned valuation thus certified as that assessed against real and personal property in said cities, villages, townships and districts in Lucas county.

The petition further avers that the defendant, claiming that the act of April 27, 1893, creating a state board of appraisers and assessors of the property of express, telegraph and telephone companies, under which said board had acted in assessing the property of the company named in Ohio, and apportioning the valuations among the several counties, including Lucas, and certifying to said Lucas county its proportion of the valuations, as aforesaid, was and is unconstitutional and void in that it was a violation of the provisions of the constitution of the United States and the constitution of the state of Ohio, has refused and still refuses to apportion the valuation certified to him by said board, as aforesaid; and refuses to place the same on the tax list to be assessed, and taxes thereon collected the same as taxes assessed and collected on other personal property; and refuses to perform any duty imposed on him by the said act.

And said petition prays that a writ of mandamus might issue against the said defendant, commanding him forthwith to apportion the amount assessed against the said express company and certified to him, as aforesaid, to the cities, villages, townships and districts, or parts thereof, in Lucas county, and to place the same on the tax list to be assessed and taxes collected thereon, the same as taxes assessed and collected on other real and personal property, etc.

To this petition the defendant answered. The answer admits the creation of the board as alleged in the petition, and that the defendant, as Auditor of Lucas county, refused to apportion the valuation thus certified to him among the taxing districts of his county, and refused to place said amount on the tax duplicate of his county, and that he refused and still re-

fuses to perform any duties imposed upon him by the act of April 27, 1893. The answer alleges as a reason for the defendant's conduct that the act in question provides for a method of appraisement and valuation which violates the provisions of the constitution of the United States and the constitution of Ohio, in the following respects, among others:

First—That property of the express company is not, under this act, taxed by a uniform rule. It is of the same character as the property of individuals, but is valued by a special board after a peculiar method, which is in violation of section 2, article 12, of the constitution of Ohio.

Second—The property of said company is not assessed at its true value in money, because the value of the capital stock is taken as a guide, thereby adding to the intrinsic value of the tangible property in this state, a value inherent in the capital stock, and due to the franchises conferred by other states, the good will and the business of the company, and the value of its property in other states, in contravention of said section 2, article 12.

Third—The equal protection of the law is denied to the express company, because its property is classified, and the method of valuation distinct from that used in valuing the property of individuals for taxation, and this in contravention of the 14th amendment of the constitution of the United States.

Fourth—The property of said company is taken without due process of law, in violation of the 14th amendment of the constitution of the United States, in this, that there is no provision in the act for a notice to the company, and for a hearing by the board of appraisers and assessors, and no appeal is provided to any superior authority for the correction of illegal, erroneous or excessive valuations.

Fifth—The said act, in that it attempts to tax the franchise of said company by taking the capital stock as a guide in valuing the tangible property, thus adding to the value of the tangible property a fictitious value inherent in the capital stock and due to the franchise and business of the company, provides, in effect, for an excise tax; and under the constitution of Ohio, no excise tax may be levied, the state being limited by section 2, article 12, of the constitution, to the taxation of property in raising general revenue.

Sixth—The act is in violation of that clause of the constitution of the United States giving Congress the power to regulate commerce among the several states, because express companies are engaged in interstate commerce, and the tax provided is a discriminating tax upon the business of such companies, amounting to an interference with and burden upon interstate commerce.

To the answer of the defendant, the board, through the attorney-general, filed a general demurrer.

J. K. Richards, Attorney-General, and Thomas McDougall, for the relator.

D. K. Watson, for the respondent.

Dickman, C. J.

The questions involved in the case at bar go directly to the constitutionality of parts of an act to amend and supplement sections 2777, 2778, 2779 and 2780, of the Revised Statutes of Ohio, passed April 27, 1893. The amendatory section of most material import, and which especially claims our consideration, is section 2778a, which is as follows:

"Every express, telegraph and telephone company, embraced in section 2777, whether chartered by the laws of this state, or any other state or country, doing business in this state, shall, annually, between the first and tenth days of May, return to the auditor of state, under the oath of its treasurer, the amount of its capital stock, its place of business, the par value and market value (or if there be no market value, then the actual value) of its shares at the time of said return. The return shall also contain a statement in detail of the entire real and personal property of said companies and where located, and the value thereof as assessed for taxation; and telegraph and telephone companies shall, in addition thereto, return the whole length of their lines, and the length of so much of their lines as is without and is within the state of Ohio, which lines shall include what said telegraph and telephone companies control and use, under lease or otherwise; and said board of appraisers and assessors shall, in determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, be

guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio, in the proportion which the same bears to the entire property of said corporations, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid. Express companies shall, in making said return, include therein, as a part thereof, a statement of their entire gross receipts for the year ending the first day of May, of the business done within the state of Ohio, giving the receipts of each office in said state, and the location thereof for said year."

Section 2780a, which regulates the apportionment of the valuation of the property of express companies, and the rate of taxation, provides as follows:

"The value of said property, moneys and credits of any express company, as found and determined by such board, to be assessed for taxation within this state, shall be apportioned by said board among the several counties in which said express companies do business, in the proportion that the gross receipts of the business of said express companies in the places where they transact business, bear to the entire gross receipts in this state of said express companies. And the board shall certify to the county auditor of each county, and to each city and incorporated village, township or district, or any part thereof therein, the amount proportioned to his county, and said board shall make and forward a like certificate to go with all the reports of the various express companies, and other papers and evidence, which form the basis of their valuation, to the auditor of state. It shall be the duty of the county auditor, upon receiving the certificate aforesaid, to apportion the amount therein stated to the cities, villages, townships, districts, or parts thereof, and the auditor shall place the same on the tax list, to be assessed and collected the same as taxes are assessed and collected on other property. And the rate of taxation shall be the same as that assessed against real and personal property in said cities, villages, townships and districts."

In compliance with the act, the National Express Company

made return to the board of appraisers and assessors, consisting of the state treasurer, the attorney-general, and auditor of state, of all its property in Ohio, and of its entire gross receipts in this state for the year ending the first of May, 1893. The board, in acordance with the provisions of the act, fixed the value of the company's property in Ohio for that year at $9,450.00; and apportioned that valuation among the several counties of the state in which the company did business, in the proportion which the gross receipts in each county bore to the entire gross receipts in the state—apportioning the sum of $754.00 to Lucas county, and certifying such amount to the auditor of that county, Charles H. Jones, the defendant, to be by him placed on the tax list to be assessed and collected the same as taxes are assessed and collected on other property. On the alleged ground that the act of April 27, 1893, is in violation of provisions of the constitution of the United States and of the constitution of Ohio, the auditor refused to apportion the valuation thus certified to him, among the taxing districts of Lucas county, and to place the amount on the tax duplicate; and indeed refused to perform any duties imposed upon him by the act.

In determining whether an act of the legislature is or is not in conflict with the constitution, it is a settled rule, that the presumption is in favor of the validity of the law. The legislative power of the state is vested in the general assembly, and whatever limitation is placed upon the exercise of that plenary grant of power must be found in a clear prohibition by the constitution. The legislative power will generally be deemed ample to authorize the enactment of a law, unless the legislative discretion has been qualified or restricted by the constitution in reference to the subject-matter in question. If the constitutionality of the law is involved in doubt, that doubt must be resolved in favor of the legislative power. The power to legislate for all the requirements of civil government is the rule, while a restriction upon the exercise of that power in a particular case is the exception. As said by Waite, C. J., in the Sinking Fund Cases, 99 U. S. 700: "One branch of the government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Until, therefore, the invalidity of an act is shown beyond a reasonable doubt, it is the duty of this court to hold that the co-ordinate legislative department of the state government has not exceeded its constitutional power.

It is contended in behalf of the defendant, that the property of the National Express Company is not, under the act of April 27, 1893, known as the Nichols law, taxed by a uniform rule; that it is of the same character as the property of individuals, but is valued by a special board, having a peculiar method; and that the act is in violation of section 2 of article 12, of the constitution of Ohio, which provides that, "laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all real and personal property, according to its true value in money."

The constitution thus provides that there shall be equality in the burdens of taxation; and that when the true value of all property, real and personal, has once been ascertained, the same value shall be subjected to the same burden. Taxation by a uniform rule will require that the rate of taxation shall be uniform, and such uniformity co-extensive with the territory to which it applies, whether the tax is a state, county, township, or city tax; and that every species of property not exempt from taxation, whether lands, goods, money or choses in action, and however used or employed, shall go upon the tax duplicate at its true value in money. The true value in money is adopted as a standard for taxation—as the basis upon which a uniform rate of taxation is to be fixed. But taxation by a uniform rule does not necessarily demand that there should be the same mode of assessment for every species of property, without regard to any classification.

An assessment, in the sense of a valuation of the property of the taxpayer for the purpose of determining the proportion of tax to be paid, should, it is true, be uniform in its mode, to the extent that the property is assessed according to its true value in money. But it would not follow that different classes of property may not be valued for taxation by different officers and boards, and by different modes and agencies. The same rigid and inflexible method of assessment for all classes of property might result in a marked inequality in the burden of taxation.

Hence it has been the policy of the legislature to classify, for the purpose of assessment and taxation, various kinds of property, such as the property of merchants, manufacturers, incorporated banks, unincorporated banks and bankers, railroad companies, and other corporations. A classification, however, for that purpose does not, of necessity, infringe the constitution of the state, because the same mode and the same officers and boards are not resorted to, for listing and valuing for taxation the different kinds of property embraced in the respective classes.

As illustrative of differences in the modes of assessment growing out of a classification of the property above referred to, a merchant, by section 2740 of the Revised Statutes, is required to make out and deliver to the assessor a statement of the value of his goods and merchandise, not as estimated on the regular day for listing property under the statute, but the average value during the year next previous to the time of making such statement, or during such previous months as he shall have been engaged in business. Manufacturers, under section 2742, are required to return to the assessor the average value of raw material and manufactured articles on hand during the year next previous, or during such portion of the year as they shall have been engaged in business.

The mode and agencies employed, under the statute, for listing, valuing and equalizing shares of bank stocks, are not the same as those employed for the like as to other property. Unincorporated banks and bankers, and incorporated banks make returns for taxation to the county auditor, and not to the local assessor. The cashier of each incorporated bank returns annually to the county auditor the resources and liabilities of the bank, together with the number of shares held by each stockholder, and the par value of each share. The county auditor fixes the total value of the shares according to their true value in money, and deducting the value of real estate included in the statement of resources, transmits a copy of the cashier's report, together with the valuation of such shares, to an annual state board of equalization consisting of the governor, auditor of state, and attorney-general, who equalize the value of the shares, being authorized to increase or diminish the value returned by the auditor. As in the case of

incorporated banks, so, the mode of ascertaining the taxable value of the personal property of unincorporated banks is alike peculiar to those associations, as belonging to no distinct class for the purposes of taxation. Sections 2758-2769 and 2808, Revised Statutes.

In Wagoner vs. Loomis, 37 Ohio St. 571, it was urged in argument, that because a method of return, and mode of valuation, and agency for determining valuation, separate and distinct from that as to individuals, was fixed in reference to banks, the law violated section 2 of article 12 of the constitution. But it was held in that case, that statutory provisions whereby different classes of property are listed and valued for taxation in and by different modes and agencies, are not necessarily in conflict with the provisions of the constitution which require all property to be taxed by a uniform rule, and according to its true value in money.

Under the statute, the county auditors of the several counties in the state in which any railroad company has its road or any part thereof, constitute a board of appraisers and assessors for such company. As a board of valuation, it is made their duty to apportion the value of the property, moneys, and credits of such railroad company, among the several counties through which such road or any part thereof runs. And when any railroad company has part of its road in this state, and part in another state, the total value of the property, moneys, and credits of such company is to be apportioned, for the purposes of taxation, in the proportion the length of the road in this state bears to the whole length of the road. It will be observed that the mode of apportioning the value of the property of railroad companies among the several counties, as provided in section 2774 of the Revised Statutes, is substantially applied in the Nichols law to the apportionment of the value of the property of telegraph and telephone companies.

And by section 2744 of the Revised Statutes, a special mode is provided by which corporations, generally, are to list their property for taxation. In all cases return is to be made to the several auditors of the respective counties where such property is situated, and the value of the property is apportioned among the different taxing districts.

Thus it will be seen, that by legislative enactment, differ-

ent species of property have been classified and subjected to different modes of assessment, but all having in view one result—the ascertainment of the true value in money of the property embraced in the respective classes, and the taxation of all property by a uniform rule. As said in Wagoner vs. Loomis, supra, "whether it was wise to adopt different modes and agencies for determining the value of taxable property, we need not consider. Much might be said in its favor. But we can, and do affirm, with the utmost confidence, that an honest and intelligent discharge of duty by those intrusted with the execution of the respective modes provided by law, would accomplish all that was intended by the constitution."

But it is contended in behalf of the defendant, that not only was the property of the National Express Company valued by a special board, after a special method, but that its property was not assessed at its true value in money, because the value of the capital stock was taken as a guide, thereby, in contravention of the constitution, adding to the intrinsic value of the tangible property in this state a value inherent in the capital stock, and due to the franchise, good will, and business of the company, and the value of its property in other states.

The Express Company, between the first and tenth days of May, as required by the Nichols law, returned to the auditor of state, under the oath of its treasurer, the amount of its capital stock, its place of business, and the par value and market value of its shares at the time of such return. The return also contained a detailed statement of the entire real and personal property of the company and where located, and the value thereof as assessed and taxed. The board of appraisers and assessors, in determining the value of the company's property in this state to be assessed and taxed, were, in the words of the statute, guided by the value of the property as determined by the value of the entire capital stock of the company, and such other evidence and rules as would enable the board to arrive at the true value in money of the entire property of the company within the state, in the proportion which the same bore to the entire property of the company as determined by the value of the capital stock thereof, and other evidence and rules.

The board in determining the value of the company's prop-

erty in this state for taxation, is not required to fix the value of such property upon the principle that the value of the entire property of the company shall be deemed the same as the value of its entire capital stock—thus making the respective values equivalents of each other. But taking the market value of the entire capital stock as a datum, the board is to be only guided thereby in ascertaining the true value in money of the company's property in this state. The statute does not bind the board to find the value of the entire property of the company equal to that of the entire capital stock. While the value of the property may be less, there may be cases, and not uncommon, in which the value of the property will exceed the market value of the capital stock.

The property or means contributed by the stockholders of a corporation as the fund or basis for the business for which the corporation was formed constitutes its capital. But "there is a distinction between the capital of a corporation and its capital stock, though they are often used as interchangeable terms. The capital stock is clearly not the same as property possessed by the corporation; for the capital stock remains fixed although the actual property of the corporation varies in value and is constantly increasing or diminishing in amount. What the amount of the capital shall be is within the discretion of the managers, but the amount of the capital stock is limited and determined by the charter and the laws governing it. It follows therefore that a limit imposed upon the capital stock of a corporation does not restrict the amount of property which it may own." Beach Priv. Corp. sec. 466.

It is contended that when the value of the shares of the capital stock of a corporation is augmented through the franchise, good will, and successful management of the business of the concern, such value should not avail to add to the true value in money of the tangible property of the corporation for the purpose of taxation. The fact, it is said, that the shares in a corporation with a capital stock of $100,000, are selling at $150 each, on a par value of $100, should not serve for guidance in arriving at the true value in money of the tangible property of the company. If the component parts of the whole machinery and apparatus employed in carrying on a trade or manufacturing business were sold separately, at

public or private sale, to different purchasers, the market value of the capital stock might play a very unimportant part. But the property of a corporation may be regarded in the aggregate, as a unit, an entirety, as a plant designed for a specific object; and its value may be estimated not in parts, but taken as a whole. If the market value—perhaps the closest approximation to the true value in money—of the corporate property as a whole, were inquired into, the market value of the capital stock would become a controlling factor in fixing the value of the property. Should all the stockholders unite to sell the corporate plant as an entirety, they would not be inclined to sell it for less than the market value of the aggregate shares of the capital stock. Besides, while the amount of the capital stock may be limited by the charter and the laws governing it, the real and personal property of the corporation may be constantly augumented, and may keep pace with any increase in the value of the capital stock. The market value of the capital stock, it is urged, has no necessary relation to the value of the tangible property of the corporation. But such is the well understood relation between the two, that not only is the value of the capital stock an essential factor in fixing the market value of the corporate plant, but the corporate capital or property has a reflex action on the value of the capital stock. "Shares in a corporation," says Mr. Morawetz, "represent fractional interests in the entire corporate concern, and their value necessarily depends upon the real capital which the company owns. The whole and the sum of its parts must be equal." Priv. Corp. sec. 288.

If by reason of the good will of the concern, or the skill, experience, and energy with which its business is conducted, the market value of the capital stock is largely increased, whereby the value of the tangible property of the corporation, considered as an entire plant, acquires a greater market value than it otherwise would have had, it can not properly be said not to be its true value in money within the meaning of the constitution, because good will and other elements indirectly entered into its value. The market value of property is what it will bring when sold as such property is ordinarily sold in the community where it is situated; and the fact that it is its market value can not be questioned because attributed some-

what to good will, franchise, skillful management of the property, or any other legitimate agency.

It will, we think, be conceded that the earning capacity of real estate owned by individuals may be considered in fixing its value for taxation. Take an office-building on a prominent street in one of our large cities. It will not be doubted, that by care in the selection of tenants, and in the preservation of the reputation of the building, by superior elevator service, by vigilance in guarding and protecting the property, by the exercise of skill and knowledge in the general management of the premises, a good will of the establishment will be promoted, which will tend to an extra increase in the earning capacity and value of the building. For the purpose of taxation, it would be none the less the true value in money of the building, because contributed to by the operative causes that gave rise to the good will. We discover no satisfactory reason why the same rule should not apply to the valuation of corporate property—why the selling value of the capital stock, as affected by the good will of the business, should be excluded from the consideration of the board of appraisers and assessors under the Nichols law, charged with the valuation of corporate property in this state, especially as the capital stock when paid up, practically represents, at least, an equal value of the corporate property.

But it is contended furthermore, that the act of April 27, 1893, is in violation of section 16 of article 1 of the constitution of Ohio, which provides that: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law;" and also in violation of the 14th amendment of the federal constitution, which provides, among other things: "Nor shall any state deprive any person of life, liberty, or property without due process of law." The property of the express company, it is alleged, was taken without due course or process of law in this, that the act in question does not provide for any notice of the company, nor for a hearing by the board of appraisers and assessors, nor for an appeal to any superior authority for the correction of illegal, erroneous or excessive valuations.

In the case at bar, it will not be claimed that the express

company has, in fact, been deprived of its constitutional right of due process of law. The company had timely notice, and appeared by counsel before the board, and had a full hearing touching its property, money, credits, and the value thereof, and its objections to the Nichols law.

The law itself states the time when the board shall meet, and the express company could not ignore the time of meeting. The meetings of the board are not secret, and the company had the right to be present and explain the statement rendered of its property and the value thereof. Indeed, without notice from the board, or by the terms of the law, the company would have been unable to make the return prescribed by the statute. And of the company's return it may be said, in the language of the opinion in the Kentucky Railroad Tax Cases, 115 U. S. 321: "This return, made by the corporation through its officers, is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property, and may be verified and fortified by such explanations and proofs as it may see fit to insert."

In the State Railroad Tax Cases, 92 U. S. 575, it was charged that the board increased the estimates of value reported to the auditor of state, without notice to the companies, and without sufficient evidence that it ought to be done; and it was strenuously urged upon the court, that for want of such notice and a hearing, the whole assessment of the property and levy of taxes was void as being without "due process of law." But it was said by Mr. Justice Miller, in delivering the opinion of the court: "This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked."

It is said, however, that the act under consideration makes no provision for an appeal to any higher authority, board, or tribunal authorized to hear complaints, and correct excessive, illegal, or erroneous assessments. The power vested in the state auditor, by section 167 of the Revised Statutes, to correct errors of assessment, though not supplying a complete remedy, is not inapplicable, we think, to the procedure under the act of April 27, 1893. The section reads as follows: "He

may remit such taxes and penalties thereon as he ascertains to have been illegally assessed, and such penalties as have accrued or may accrue in consequence of the negligence or error of any officer required to do any duty relating to the assessment of property for taxation, or the levy or collection of taxes, and he may, from time to time, correct any error in any assessment of property for taxation, or in the duplicate of taxes in any county; provided, that when the amount to be remitted in any one case shall exceed one hundred dollars he shall proceed to the office of the governor and take to his assistance the governor and attorney-general, and in all such cases may remit no more than shall be agreed upon by a majority of the officers named. This section is in pari materia, and is a part of the taxing system of the state, or of the machinery for collecting the public revenue. The Nichols law is part of the same system, and is merely an amendment and supplement of the sections of the statute regulating express and telegraph companies. While it might seem improper to submit the quasi judicial action of a board composed of the treasurer, attorney-general and auditor of state to the review of the state auditor alone, it would not seem exceptionable, when the amount of taxes to be remitted exceeded one hundred dollars, that there might be an appeal to a board consisting of the governor, auditor of state, and attorney-general.

In Davidson vs. New Orleans, 96 U. S. 97, it was laid down as a general proposition, that whenever, by the laws of the state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or some limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. By section 5848 of the Revised Statutes, "courts of common pleas and superior courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either." And by section 5849, in actions to enjoin the illegal levy of

taxes and assessments, "if the levy would go upon the county duplicate, the county auditor must be joined in the action." In Jones vs. Davis, 35 Ohio St. 474, it was held by this court, that the addition of an item of property to the return of the taxpayer, by a board of equalization, with a direction to the auditor to carry the same upon the duplicate, and to assess against it the fixed rate for state, county, and other purposes, does not of itself constitute the levy; nor does the mere ascertainment of the rate of assessment by those whose duty it is to determine the rate to be levied. The process is not complete until the valuation of the property, with the sum to be charged against it, is carried upon the duplicate.

So that, in the case of an express company, after the board of appraisers and assessors has certified to the county auditor the amount proportioned to his county of the value of the company's property; and before the county auditor has apportioned the amount among the several taxing districts, and placed the same on the tax list to be assessed and collected as taxes are assessed and collected on other property, an injunction will lie in favor of the company, to enjoin the auditor from carrying such amount upon the duplicate, and thereby afford an opportunity to inquire into the legality of the assessment before a lien attaches, and before the treasurer is warranted to make collection.

In McMillen vs. Anderson, 95 U. S. 37, it was held, that a statute which gives a person against whom taxes are assessed a right to enjoin their collection, and have their validity judicially determined, is due process of law. The defendant, a tax collector, of the state of Louisiana, seized property of the plaintiff, and was about to sell it for the payment of a license tax, for which the latter was liable. The plaintiff obtained a temporary injunction against the sale of the property seized. Defendant pleaded that the seizure was for taxes due, and that his duty as collector required him to make it. Judgment was rendered against the plaintiff, and in the Supreme Court of the United States, it was assigned for error, that the law under which the proceedings of the defendant were had was void, as it deprived the plaintiff of his property without due process of law. But the court was of opinion that the person charged with such tax was not without legal remedy by the laws of

Louisiana. "It is probable," said the court, "that in that state, as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party, and recover back the money as paid under duress, if the tax was illegal. But however that may be, it is quite certain that he can, if he is wrongfully taxed, stay the proceeding for its collection by process of injunction. See Fonqua's Code of Practice of Louisiana, articles 296-309, inclusive."

In addition to the foregoing objections to the act of April 27, 1893, on constitutional grounds, others are urged by the defendant, but we deem them untenable, and not sufficiently involved in doubt to require consideration.

The demurrer to the answer is sustained and a peremptory writ of mandamus allowed.

Jus Field
Jan 21st 97.

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165-194

The Supreme Court of the United States.

OCTOBER TERM, 1896.

HENRY SANFORD, President of the Adams Express Company, *Appellant*,

No. 337. *vs.*

EBENEZER W. POE, Auditor of the State of Ohio, JOHN K. RICHARDS, Attorney-General, and WILLIAM T. COPE, State Treasurer.

HENRY SANFORD, President of the Adams Express Company, *Appellant*,

No. 338. *vs.*

EBENEZER W. POE, Auditor of the State of Ohio, WILLIAM H. HALLIDAY, Auditor of Franklin County, and others, County Auditors.

JAMES C. FARGO, President of the American Express Company, *Appellant*,

No. 339. *vs.*

SAME.

THOMAS C. PLATT, President of the United States Express Company, *Appellant*,

No. 340. *vs.*

SAME.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE APPELLANTS.

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BRIEF FOR THE APPELLANTS.

No. 337 is the case of the Adams Express Company to enjoin the assessment against it under the Nichols tax law, for the year 1893. It arises under the act as originally passed, April 27, 1893 (90 O. L. 330, Exhibit Book 1). Nos. 338, 339 and 340 are the cases of the Adams Express Company,

the American Express Company, and the United States Express Company, to enjoin the assessments against those companies, for the year 1894. They arise under the act as amended May 10, 1894 (91 O. L. 220, Exhibit Book 6).

All of the cases come up on appeals from decrees sustaining demurrers to the bills, and therefore present the question of the sufficiency of the bills. That question relates to the validity of the Nichols law, as applied to express companies, and to the legality of the particular assessments made thereunder against the plaintiffs, and complained of in the bills. It is discussed in our brief in Nos. 398, 399 and 400 (the cases for 1895), to which we refer the court, as our argument on the merits in the present cases. We content ourselves with now adding to that discussion on the merits, some observations peculiar to the present cases, and especially to Nos. 338, 339 and 340 (the cases for 1894).

The court will notice that the final decrees sustaining the demurrers to the bills, and dissolving the preliminary injunctions, were entered under stipulations, approved by the court, that the plaintiffs should have the benefit not only of the averments of their bills, but also of the statements concerning their personal property subject to taxation, and the value thereof, as set forth in their returns to the state board, which are filed as exhibits to the bills, the same as if incorporated into the bills by amendment. (See the final decrees in each case.)

The bills aver, and the demurrers admit, that aside from certain real estate (which has been duly assessed, and the taxes on which have been duly paid), the express companies have "no property in the state of Ohio, except certain horses, wagons, harness, trucks, safes, and office fixtures, located at different points in the state, the items of principal value being horses, wagons and trucks, which are used by the company in the collection and delivery of packages in the various towns

and cities," and that verified statements were made by each of the companies to the state board of appraisers, setting forth in detail "the true value in money of all the company's property in the state, ... together with the moneys and credits of the company within the state," the respective amounts being alleged in the bills (No. 337, Record 4, No. 338, Record 4, and similarly in Nos. 339 and 340). Under the operation of the Nichols law, the board made assessments upon these returns, the disparity between which and the returns is disclosed in the following table:

1893.

	Value as returned, and alleged in the bills.	Assessment.
Adams Express Co.	$53,080 74	$460,033 08
American Express Co.	27,300 00	400,576 45
U. S. Express Co.	26,318 00	397,300 00

1894.

Adams Express Co.	$41,102 60	$543,569 00
American Express Co.	21,795 00	446,142 00
U. S. Express Co.	26,333 00	481,348 00

I.

The appeals ought to have been taken (as they were taken in the subsequent cases for 1895, viz: Nos. 398, 399 and 400) from the circuit court directly to this court, because they are cases "that involve the construction or application of the constitution of the United States," and because they are cases "in which the law of a state is claimed to be in contravention of the constitution of the United States" (act of March 3, 1891, c. 517, sec. 5). But the appeals were taken, without objection, to the circuit court of appeals, and from that court to this court. Since, however, they are now lodged in the court that is invested with jurisdiction, under the statute, to review the judgments of the circuit court, we submit that it is immaterial (no objection having been taken below), that they

get here by a circuitous route. They are here, and this is the court that is invested with the ultimate and final jurisdiction to hear and decide them.

II.

The Nichols law, of 1894, provides (section 2778, Exhibit Book 6), that "after the assessment of the property of any company for taxation by the board, and before the certification by the auditor of state of the apportioned valuation to the several counties, as provided in section 2780, the board may, on the application of any interested person or company, or on its own motion, correct the assessment or valuation of the property of any company, in such manner as will in its judgment make the valuation thereof just and equal."

The bills to enjoin the assessments for 1894, Nos. 338, 339, and 340, aver (No. 338, Rec. 8) that "said Poe and said state board refuse to let your orator's said company know the amount of the said assessment made by the said state board against said company, but conceal the same for the purpose, as your orator is informed and believes, and therefore charges, of preventing your orator from obtaining the relief sought in this bill, although said company has notified said Poe and said state board that it desires to know the amount of said assessment, to the end that it may apply to said board for the correction thereof, as provided by the statute; and your orator insists that the said assessment is for that reason illegal." The same averment is made in the bills on behalf of the American and United States express companies. (Nos. 339, 340.)

In other words, the bills show clearly that the state board refused the plaintiffs the opportunity, provided by section 2778, of applying to the board after the assessment, and before certification by the auditor of state to the several counties, for the correction of the assessment or valuation.

III.

An injunction may be granted before the bill is filed in the clerk's office, or the summons issued. Kerr on Injunctions (2d ed.), 542, and is operative from the time the order is made, and not from the date of the writ or from the time of its being drawn up. 2 High on Injunctions (2d ed.), sec. 421; Kerr on Injunctions (2d ed.), 569, 570; 2 Daniell's Chan. Prac. (5th ed.), 1683, and n. 8.

It appears from the allegations of the amendment of the bills in the case for 1894 (No. 338, Record 25, and similarly in Nos. 339, and 340) that the auditor of state apportioned the assessment made by the state board among the several counties, and sent the certificates of such apportionment to the various county auditors before service of the injunctions, but after the orders of injunction had been allowed, and after the circuit court had acquired jurisdiction of the cases, and that such action of the auditor of state "was taken secretly and surreptitiously, in collusion with the state board, for the purpose of evading any injunction, and of defeating the relief sought by the bills, or any relief against the illegal proceedings and assessment; the auditor of state and the state board, up to the time of said action, still refusing to let the plaintiff's company know the amount of the assessment, and falsely pretending to said company that the same had not been made, and denying to said company all knowledge of the proceedings of said board or access to its minutes or sessions, or any opportunity to apply to the board for the correction of the assessment."

Attachment is not the only remedy for the violation of an injunction. The chancellor may order the status quo restored. It would be competent for the court to cancel the apportionment made by the auditor, under the circumstances stated, after the court had acquired jurisdiction of the cases.

But, independent of that ground, the suit might have been

brought originally against the various county auditors, without being obnoxious either to the objection of multifariousness or want of jurisdictional amount. Marshall vs. Holmes, 141 U. S. 589; Union Pacific Railroad Co. vs. McShane, 3 Dill, 303, affirmed 22 Wall. 444. Marshall vs. Holmes was a suit to enjoin the enforcement of several judgments which had been obtained fraudulently by the defendant against the plaintiff. In each case the judgment was for less than $500 (at that time the jurisdictional amount), but the aggregate of all the judgments was over $3,000. The court held that "as all of the judgments were held in the same right and against the same party, and as their validity depended upon the same facts, the defendant therein, in order to avoid a multiplicity of actions and the vexation and costs arising from numerous executions and levies, was entitled to bring suit for a final decree determining the matter in dispute, that was common to all the parties; and that, as under the rules of equity, such a suit could be brought in a court of the United States, the aggregate amount of all the judgments sought to be annulled was the value of the matter in dispute; and that consequently the cause was removable, so far as the amount involved was concerned." 141 U. S. 595.

IV.

The assessments were evidently not made on the basis of the true value in money of the property of the express companies within the state of Ohio, and so Judge Taft held, not only in his original opinion, but in his final opinion. (Exhibit Book 49, and 95.)

They were manifestly not arrived at by any process of valuation or calculation at all, but were determined by the board arbitrarily, upon the simple consideration that the express companies, in view of the market value of their capital shares, should pay large taxes in the state of Ohio, wholly without

reference to the property which they owned or held within the state. The apparently precise sums assessed (odd dollars and cents instead of round figures) was a part of the subterfuge to give the assessments the appearance of calculation and exactness.

Judge Taft called upon the defendants to explain the basis of their assessments for the year 1893, and they were obliged to confess that "in arriving at the value of the property of these express companies taxable in Ohio, the board did not follow any fixed rule, except the rule that property in Ohio is ordinarily taxed at not more than two thirds of its actual value, and the law governing this board." (No. 337, Record 36.) What they refer to as "the law governing this board" is shown by the subsequent statement that they were "guided in determining the value of the property by the value of the entire capital stock."

"The board of appraisers are unable to satisfactorily explain the basis upon which they affixed to property returned by the express company as worth $53,000, an additional value of over $400,000, except that in reaching this additional value they considered the gross receipts of the company in Ohio, and the market value of its entire capital stock, and other evidence and information. This only confirms the conclusion reached in the telegraph case that the board construed the Nichols law to mean that there should be apportioned to the state of Ohio for taxation, as property within the state, a fair share of the aggregate market value of the capital stock of the company." (Judge Taft, Opinion, Exhibit Book 86).

It is true that the auditor of state, in his affidavit, concerning the assessments for 1893, refers to small returns from several offices of the company, and the supposed omission from the returns of pouches, not attached to any office, but used on railroad trains. On this point Judge Taft said:

"There is a suggestion in the report of the assessors that the express company did not include the safes and pouches which must be used in its business; but it is not claimed and could not be that the failure to return the safes is an explanation of the difference between $53,000, the amount returned by the company as the value of its property in Ohio, and the $460,000 at which the board has assessed the value of their property." (Exhibit Book 84.)

And again:

"The suggestion is made that the return of the company is an undervaluation, because no personal property, or a very small amount, is returned from many offices of the company in Ohio. I do not know why that should indicate undervaluation, because it plainly grows out of the fact that at many small stations along the lines of the railroads upon which the express companies operate, the express company uses the office furniture and the office of the railroad company, and has no property of its own." (Exhibit Book 86.)

Again, in the final opinion:

"It is perfectly manifest that what the board of assessors did was not to estimate the tangible personal property of the express company as it would have been estimated if new, or in a store or factory, or on the farm from which it was purchased. The difference between $53,000, the amount in the return, and $460,000, the amount assessed, can not be explained by a failure to return a few traveling safes and pouches, or by any possible undervaluation. The slight amount in value of the company's property return from each of its offices is no evidence of fraud, for it is common knowledge that the express company's business, except in large cities, is done usually with the furniture and in the offices of the railway company whose line it uses." (Exhibit Book 98.)

In his final opinion, dismissing the bill in the case of the Adams Express Company for 1893 (which opinion was also

filed in the three express cases for 1894), Judge Taft makes a calculation to show the basis on which the board probably made the assessment against the Adams Company for 1893. (Exhibit Book 99.) But it is purely accidental that the calculation produces figures approximating the assessment made against the Adams Company for that year. The calculation will not work out in the case of either of the other express companies for that year, and, applied to the year 1894, would give the following results, as compared with the assessments actually made:

Adams	$336,000 00	instead of	$543,569 00	assessed.
American	124,356 58	"	446,142 00	"
United States	98,852 11	"	481,348 00	"

But the calculation suggested by Judge Taft is not permissible as a basis of assessment, for two reasons; first, because it substitutes a valuation of the capital stock for a valuation of the property of the companies; and secondly, because in apportioning to Ohio her share of what is thus erroneously assumed to be "the total taxable personal property of the company," sight is lost of the fact that a large proportion (millions of dollars according to the allegations of the bills of two of the companies for 1894) of the stocks and bonds which make up this totality of personal property is not held or taxable in Ohio. But this involves a consideration of the merits of the case, for which we refer the court to our brief in Nos. 398, 399, and 400.

V.

The decision of the Supreme Court of Ohio, in State ex rel. vs. Jones, might be passed over with the suggestion that the questions of law arising upon the facts presented by the records now before this court, were not raised or decided in that case. But the circumstances under which the case arose, as bearing upon the present litigation, seem to justify some further reference to it.

The plaintiffs, being citizens of another state, brought the cases at bar in the federal court in preference to the state court, not by accident, but deliberately. Indeed, one of them, the Western Union Telegraph Company, having already commenced its action in the state court, dismissed it and sought the federal forum instead. The right of the plaintiffs to make this choice of forum was a right secured to them by the supreme law of the land, and a right which the defendants were therefore bound to respect and acquiesce in; and it became the duty of the circuit court to give, and of the defendants to receive, the judgment of that court, upon every question of law or fact necessary to a decision of the case. For a time the cases proceeded upon that assumption, and in an orderly way. Preliminary injunctions were granted on the filing of the bills, November 22, or 23, 1893. Motions to dissolve, and demurrers to the bills, were duly filed and fully argued December 28 and 29, 1893. Elaborate briefs were submitted on both sides, those of the defendants being printed, and the case was taken under advisement by the circuit court. On March 14, 1894, the court announced a provisional opinion, and ordered a re-argument, which was set for March 23d. (Exhibit Book 42.) In this provisional opinion the court held that equity had jurisdiction, and leave was given to the plaintiffs, within ten days, to make an actual tender of the taxes which they conceded to be due. Up to this point the proceedings had been conducted in an orderly and dignified manner, becoming the court and the cause. But the fact that the court gave leave to the plaintiffs to make a tender, without which it held that the suits could not be maintained, coupled with the declaration that the remedy was in equity, led the defendants to apprehend, as the sequel plainly shows, that the final decision might be against them, and straightway they resorted to management and tactics to get up a case in the supreme court of the state, for the purpose of removing the con-

troversy into that court, and of anticipating the judgment of the federal court. But that was something which the defendants had no right to attempt, for the plaintiffs were entitled to a determination of the controversy, and of the whole controversy, in an orderly way in the federal court.

That the purpose of the defendants was to transfer the controversy, and the determination of the questions involved, to the state courts can not be denied. It was distinctly avowed at the time by the defendants, in a printed circular which they signed and submitted to the general assembly of Ohio, from which we make the following extract:

"The cases brought in the United States Circuit court have been argued twice, on December 28 and 29, and on March 23. Judge Taft has these cases under advisement. The delay in the decision is due to the natural and proper reluctance of the judge to pass upon a question which it is the peculiar province of the Supreme Court of Ohio to pass on, namely, whether the Nichols law violates the constitution of Ohio. In view of this fact, the auditor of Lucas county, having refused to place on his duplicate the valuation of the property of the National Express Company, certified to him by the state board, a test case in mandamus has been brought in the Supreme Court of Ohio, which will be argued on Thursday, April 12th."

Whether it was apprehension of an unfavorable decision by the federal court, or some other motive, that led the defendants to get up the case referred to is immaterial. It is enough that they did so, for the purpose of anticipating the judgment of the circuit court, although we can readily understand that the real motive which actuated them was intense fear that the federal court was about to decide the case in their favor.

The final re-argument in the circuit court being already set for March 23d, and being only four days off, the defendants,

on March 19th, filed a petition in mandamus in the Supreme Court of Ohio, against the auditor of Lucas county. A transcript of the proceedings is in the record in No. 337, p. 46. The petition, when it was filed, bore an entry of appearance, signed by the defendant, the auditor of Lucas county, and also his consent that an alternative writ should issue. Accordingly, a writ was issued on the same day, returnable March 29th, and was in fact returned March 21st. The petition sought to compel the auditor of Lucas county to place upon the tax duplicate for the year 1893 the sum of $754 against the National Express Company, in order that the same might "be assessed and the taxes thereon collected." The taxes for the entire year 1893, assessable in Lucas county on account of this valuation, amounted to $21.36, or, adding penalty, $22.43. But on March 16, 1894, three days before the filing of the petition in mandamus, the National Express Company had paid to the treasurer of Lucas county, on account of its taxes, for the year 1893, $23.44, or $1.01 more than was claimed to be due from it for taxes under the so-called Nichols law. For this payment the company received and holds the receipt of the treasurer of the county, reciting that it was made on acount of the taxes due from the company for the year 1893. (No. 337, Record 43.) As a matter of fact, therefore, there was no real controversy or subject of controversy upon which to base the mandamus proceeding in the Supreme Court of Ohio, and that was perfectly well known to the defendants.

We do not mean to say that the defendants intended to slip the case through the Supreme Court of Ohio without advising the plaintiffs of its pendency, or that the attorney, who was procured to sign an answer for the auditor of Lucas county, secretly attempted, while pretending to represent the auditor, to procure a decision in favor of the relators. But we do say that the suit was just such a proceeding as Chief Justice

Taney mentioned in the following passage from his opinion, in Lord vs. Veazie, 8 How. 251, 255:

"It is the office of courts of justice to decide the rights of persons and of property when the persons interested can not adjust them by agreement between themselves, and to do this upon a full hearing of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real or substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended and treated as a punishable contempt of court."

It is also such a proceeding as Mr. Justice Grier had in mind when he said in Pease vs. Peck, 18 How. 599:

"Cases may exist also where a cause is got up in a state court for the very purpose of anticipating our decision of a question known to be pending in this court."

In the leading case of Burgess vs. Seligman, 107 U. S 32, Mr. Justice Bradley said:

"But the appellant's counsel, with much confidence, press upon our attention the decisions of the Supreme Court of Missouri on the questions involved in this case, and on the very transactions which we are considering. That court, since the determination of this case by the circuit court, has given judgment in two cases adversely to the judgment in this, and to the views above expressed. . . We have read the opinion of the court and the dissenting opinion of one of the judges with much attention, but we are unable to come to the conclusion reached by the majority. We do not consider ourselves bound to follow the decision of the state court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been

given by the state tribunals contrary to that given by the circuit court. The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. . . . Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment; as they always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. . . . In the present case, when the transactions in question took place, and when the decision of the circuit court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the circuit court was called upon, and which we are now called upon to consider. It can hardly be contended that the federal court was to wait for the state

courts to decide the merits of the controversy, and then simply register their decision; or that the judgment of the circuit court should be reversed merely because the state court has since adopted a different view. If we could see fair and reasonable ground to acquiesce in that view, we should gladly do so; but in the exercise of that independent judgment which it is our duty to apply to the case, we are forced to a different conclusion. Pease vs. Peck, 18 How. 595, and Morgan vs. Curtenius, 20 Id. 1, in which the opinions of the court were delivered by Mr. Justice Grier, are precisely in point."

Carroll County vs. Smith, 111 U. S. 556, was an action at law to recover interest coupons upon municipal bonds, the issue of which had been enjoined in a suit in a state court, and the decision affirmed in the supreme court of the state. Mr. Justice Matthews, delivering the opinion of the Supreme Court of the United States, after stating that the plaintiff was not a party to the proceedings in the state court, and therefore not bound by the judgment in those proceedings as an estoppel, said (p. 562):

"The decision in Hawkins vs. Carroll County, above referred to, is not a judgment of the Supreme Court of Mississippi, construing the constitution and laws of the state, which, without regard to our own opinion upon the question involved, we feel bound to adopt and apply in the present case. It is a decision upon the very bonds here in suit, pronounced after the controversy arose, and between other parties. It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the

plaintiff has a right, under the constitution of the United States, to the independent judgment of those courts, to determine for themselves what is the law of the state, by which his rights are fixed and governed. It was to that very end that the constitution granted to citizens of one state, suing in another, the choice of resorting to a federal tribunal. Burgess vs. Seligman, 107 U. S. 20, 33."

Gibson vs. Lyon, 115 U. S. 439, was an action of ejectment to recover the possession of certain real estate in Philadelphia. There was a judgment in the circuit court for the defendants below, and the plaintiffs below brought their writ of error. The defendants in error had previously had a judgment in their favor affirmed in the Supreme Court of Pennsylvania, and although that judgment in the Supreme Court of Pennsylvania, being in ejectment, was not, according to the laws of Pennsylvania, a bar to the present suit, they insisted nevertheless that it was a precedent binding upon the federal courts, inasmuch as it involved the very questions presented to the federal courts, and questions with respect to real estate situated in the state of Pennsylvania. To this claim Mr. Justice Matthews answered:

"As a precedent, the decision of the supreme court of the state, though single, is entitled to peculiar respect, because all the questions decided arise upon the local law of the state; but it can not have conclusive force in the courts of the United States, unless it has become a rule of property. Burgess vs. Seligman, 107 U. S. 20; Carroll County vs. Smith, 111 U. S. 556. "The plaintiff in error, being a citizen of New Jersey, had a constitutional right, by virtue of that fact, to invoke the jurisdiction of the courts of the United States, and is entitled to their judgment upon his rights under the laws of Pennsylvania." 115 U. S. 446.

These cases do not proceed, as the defendants erroneously

assume, upon the ground that the federal judges will exercise their functions as independent judges, only for the purpose of protecting rights vested in citizens of other states, prior to a decision by the state courts. They proceed upon the ground, as plainly stated by Mr. Justice Matthews in Gibson vs. Lyon, that "the plaintiff in error being a citizen of New Jersey, had the constitutional right, by virtue of that fact, to invoke the decision of the courts of the United States, and is entitled to their judgment upon his rights under the laws of Pennsylvania."

We do not, for the present, print the records in No. 339 (American Company's case for 1894) or No. 340 (United States Express Company's case for 1894), because those records are, word for word, the same as the record in No. 338 (Adams Express Company's case for the same year, 1894), except in the figures representing the different values and returns of, and the assessments upon, those companies. These differences are immaterial for the determination of the questions involved in the cases. They are shown by the table printed ante p. 9.

We respectfully submit that the decrees of the circuit court should be reversed, and the cases remanded with directions to overrule the demurrers and make the preliminary injunctions perpetual.

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165-194

Supreme Court of the United States.

JAMES C. FARGO,
PRESIDENT OF THE AMERICAN EXPRESS COMPANY,
Appellant,

vs.

EBENEZER W. POE,
AUDITOR OF THE STATE OF OHIO.

339.

BRIEF FOR APPELLANT.

JAMES C. CARTER,
Of Counsel for Appellant.

ALBERT B. KING & CO., 106 WILLIAM ST., N. Y.

Supreme Court of the United States

JAMES C. FARGO, President of the American Express Company,

Appellant,

vs.

EBENEZER W. POE, Auditor of the State of Ohio.

Brief for the Appellant.

The statement of the case contained in Mr. Maxwell's brief in this and other cases is referred to and adopted. Reference is also made to the authorities cited by him.

The purpose of this brief is to present in behalf of the American Express Company the views concerning the law which those and many other authorities are supposed by the undersigned to support.

The *ostensible* purpose of the laws under which the assessments against the above-named express company were made was to tax such property of express companies as was *situated* in the State of Ohio. It purports to be, not a *license fee* for doing business in Ohio, nor a tax upon *income* or upon *business*, but a tax upon *property*.

The Nichols law of 1893 requires "a statement in detail of the entire real and personal property of said companies, and where located;" declares how the assessors shall proceed "in determining the value of the property of said companies *in this State* to be taxed within the State, and assessed as herein provided," and points out the evidence which they may regard in order "to arrive at the true value in money of the entire property of said companies *within the State of Ohio*" (Exhibit Book, pp. 2 and 3). This law contemplates the assessment and taxation of both real and personal property in the same way, but apportions the product of the tax among the several counties of the State according to the amounts of business done in the several counties respectively, as indicated by the proportion of gross receipts of the companies in the several counties to the gross receipts in the whole State (Exhibit Book, p. 4).

The law of 1894 requires from the companies *separate* statements of the real and personal property of the companies *in the State*. That for real estate must contain "the value thereof as assessed for taxation;" that for personal estate simply "the value thereof;" but the board is required to assess the value of the companies' *whole* property. When assessed, however, the assessment of the real estate is to be deducted from the aggregate and left, presumably, to be taxed in the place where it is situated. The residue of the assessment, being that of the personal property, is then to be apportioned among the several counties as by the law of 1893 (Exhibit Book, pp. 8, 9 and 10).

Another law passed in 1894, *in pari materia*, imposes another and a different tax upon the *business* of these companies done in Ohio, and recognizes the taxes under notice as taxes upon property *situated within the State*. This recognition is con-

tained in the following proviso : "Provided, nothing contained in this act shall exempt or release express companies from the assessment and taxation of their *tangible* property in the manner authorized by law" (Exhibit Book, p. 41).

There is no need of further showing what the *thing* is which the laws *assume* to tax, for all the opinions which the controversy has elicited, including that of the Supreme Court of Ohio, agree that it is the property of the *companies situated in Ohio.*

We have, therefore, the case where a State assumes to impose a tax upon property because of its *situs* within the territory of the State, irrespective of the residence of the owner, and it is immediately manifest that such *situs* must be an *actual*, and not a *fictitious* or *imputed* one. It is only over property *actually* situated within its territory that a State has power to impose a tax, irrespective of the citizenship of its owners. And it is equally manifest that it is only *specific* property that can have any *situs* at all. The specific property of one of these express companies situated in Ohio may be, in fact, equal in value to one-fiftieth part of the whole property of such company ; but we cannot, for this reason, correctly say that one fiftieth of the whole property of the company, treated as a *unit*, is situated there. All we can say is that certain parts of its property are situated in that State, which happen to amount in value to one-fiftieth of its whole property.

Inasmuch as the State of Ohio had the rightful power to impose a tax upon the property of the express companies actually situated within its territory, if there is any invalidity in the assessments under notice it must be found in the manner in which they were laid. Now, the bills charge that the express companies had certain property in

the State during the years for which they were assessed, and they describe such property, and state its value, and state that they had no other property. The demurrers admit these allegations to be true. The personal property thus described consists of horses, wagons, trucks, harness, safes and office fixtures, &c. The business of taxing such property, as ordinarily understood, consisted simply in valuing it and applying to the assessed valuation the rate fixed upon. The important part of this work was the valuation. This was easy enough, although different estimates would not, it is probable, precisely agree. It was a matter resting in opinion, and opinions might, to some extent, honestly differ. There could, however, be no difference of opinion, taking the term "value of property" to mean what men universally mean by it, as to the *method* of, ascertaining the proper valuation. It was by simply ascertaining what the property was worth in money, that is, what it would sell for, or what it could be reproduced for. This is the valuation which the law itself obliged the companies to state in the returns which it required.

The companies, in pursuance of this requirement of law, stated these valuations, and they are set forth in the bills. They were as follows in the case of the American Express Company: For 1893, $27,300; for 1894, $21,795; for 1895, $23,430. The correctness of these assessments is admitted by the demurrer, and we have it therefore admitted t at, according to the *ordinary* mode of valuing such property, and the *ordinary* meaning of the term value of property, the described property of this company in the years mentioned was as thus returned.

The board, however, in making its valuations of the same property, fixed them at the following

amounts: For 1893, $400,576.45; for 1894, $446,-142.00; for 1895, $499,373.60.

We are not left in doubt concerning the method by which these astonishing results were reached.

What the State of Ohio assumed to do was to tax property, not because of its ownership by citizens of the State, but irrespective of citizenship and on account of its *situs* within the State. Nor did it assume to impose a *specific* tax, but a tax determinable by value. This property of the express companies was ordinary movable personal property, the actual value of which in money was easily determinable in the ordinary way. The method actually employed was this: The Board required from the companies, and received (at least from the American Express Company) statements showing the value of its *whole* property, of that part actually situated in Ohio, the nominal amount of its capital stock, and its actual value as determined by the selling price of its shares. If the Board had taken the actual value of the property in Ohio, it would have assessed it, the personalty (for the year 1895, and the difference between that and the other years is not material) at $23,430. The omissions to return some small items might slightly swell the amount. It utterly dismissed the actual value thus ascertained by the ordinary method, and proceeded with an attempt to ascertain what the value of it would be if it were treated as a certain fractional part of a supposed "*unit profit-producing plant;*" and to this end it assumed that the *real* value of the whole of this plant was determined by the value of the whole capital stock according to its selling price. Having thus ascertained the value of the whole *unit plant*, the problem remained to ascertain how much of that *unit plant* was in Ohio, and this was solved by the assumption that, as the

actual value in Ohio of the specific personal property therein situated, valued according to the ordinary method, was to the value of the whole property of the company valued in like manner, so was the value of the part of the unit plant in Ohio to the whole value of the unit plant as determined by the whole value of the capital stock.

In this way property really of the value of $23,400 was valued and assessed for taxation for the year 1895 at $499,377.60!

The case, as thus stated, hardly leaves room for argument, for argument would assume that the error is not obvious and flagrant, whereas it is so obvious and flagrant that it scarcely seems worth while to inquire into the nature of the error. The valuations declared by the Board of Assessors are—must be—either purely capricious and arbitrary, in which case the error is plain, or the result of applying some test of valuation which has no just or reasonable relation to value, in which case the error is equally plain.

We must, therefore, begin our discussion by showing that we have correctly stated the case.

POINTS.

First Point.—The laws under which the assessments were made *required* this mode of valuation, and we are entitled—indeed bound in the absence of evidence to the contrary—to assume that the officers followed the law.

1. The Nichols Law of 1893, provides that "said Board of Appraisers and Assessors

"shall, in determining the value of the "property of said companies in this State, "to be taxed within the State and assessed "as herein provided, be quoted by the value "of said property as determined by the "value of the entire capital stock of said "companies, and such other evidence and "rules as will enable said board to arrive at "the true value in money of the entire "property of said companies within the "State of Ohio, in the proportion which the "same bears to the entire property of said "corporations, as determined by the value "of the capital stock thereof, and the other "evidence and rules aforesaid" (Ex. Book p. 3). The requirement of the Law of 1894 is the same (Ex. Book p. 8).

Language could not in plainer terms *prohibit* the ordinary mode of ascertaining the value of such property as these express companies possessed in Ohio and compel an ascertainment by assuming the value of the capital stock to determine the value of the whole property of the company, and that the value of the property in Ohio was such part of the value of the capital stock, as its proportion was to the whole property of the company.

2. The Supreme Court of Ohio, in its opinion (in the suit contrived to obtain from it an adjudication on the validity of the law) says: "The statute does not *bind* the board to find "the entire value of the entire property of "the company equal to that of the entire "capital stock." True, it does not so bind

the board in *terms*, but it does in substance. What other meaning can be placed upon the words: "And the said board * * * shall "be *guided* by the value of said property *as* "*determined by the value of the entire capi-* "*tal stock of said companies*"?

The Circuit Court of Appeals also seemed to think that the value of the entire capital was "but one of the factors" which the law required to be taken into account, and that the law provided that "other evidence" might be considered (Ex. Book, p. 112). But what is this "other evidence" which may be considered? Only *such* "as will enable said "board to arrive at the true value in money "of the entire property of said companies "within the State of Ohio, *in the proportion* "which the same bears to the entire property "of said corporations *as determined* by the "value of the capital stock thereof." The ordinary mode of valuation is therefore absolutely excluded, and the board effectually confined to the method of taking the value of the whole property to be *determined* by that of the capital stock, and the value of that in Ohio to be its proportional part of this value of the whole capital stock.

3. But our argument does not call for any fineness of statement or reasoning upon this point. Whatever the Supreme Court of Ohio or the Circuit Court of Appeals may have thought as to whether the board was bound to regard the value of the entire capital stock as *alone* determining the value of the entire property (as, according to these

laws, it certainly was), neither pretends that it was not the *principal test* prescribed by the statute; and a law which makes a wholly erroneous test in the valuation of property, the principal one is just as invalid as if it made it the only one.

Second Point.—We are now ready for the question whether such laws are valid enactments; and, first, we affirm that they are in direct conflict with those provisions of the Federal Constitution which forbid the taking of property "without due process of law." If this be true the Court will be in no manner embarrassed by any opinion of the Supreme Court of Ohio that the laws are not infractions of the Constitution of that State.

1. The property to be assessed was wholly, or chiefly, personal chattels, such as horses, wagons, &c. They were *specific* things belonging to the company having an actual *situs* in Ohio and taxable by that State. The State proposed to *value* them, not as specific things, but as a part of a distinct whole, embracing these and many other things with them. Their value was easily ascertainable, in the ordinary method, by finding their market value, or the cost at which they could be produced and reproduced. The law required this ordinary mode to be ignored and a value to be placed upon them which should be determined by the value of the capital

stock, a thing which had *no relation whatever to their value;* for nothing is more certain than that the value of this property would be precisely the same—could be bought for the same price—be sold for the same price——be produced and reproduced for the same price—whether the capital stock of the company was 50 per cent. below, or 100 per cent. above par.

2. Under this method of valuation, whether the horses were lame or sound, or old or young, whether the wagons and harness were old or new, was of little consequence; but any valuable franchises which the company might possess which increased the profits of its business in other States, however remote, every favorable contract with railroad companies which increased the profits of its business, immediately added to the value of every horse, wagon and harness in Ohio. And if a debt due to the company from a debtor in Ohio of $1,000 was included in its property there it became subject to valuation for the purposes of taxation at more than $15,000!

3. Is this "a taking of property" without due process of law? Certainly it is, unless the requirement of "due process of law" can in all instances be satisfied by a mere statutory enactment. We are not called upon at the present stage of constitutional jurisprudence to go into argument to show that this cannot be done. The safeguard which forbids the

taking of property without due process of law is a protection *against legislation.* It cannot be met and overcome by a mere exercise of the power which it was erected to control.

Judge COOLEY properly declares, and supports the declaration by abundant authority, "An unlimited power to make any and "everything lawful which the Legislature "might see fit to call taxation, would be "when plainly stated an unlimited power to "plunder the citizen."

> Cooley, Constitutional Limitations (1st Ed.) 488.

4. *Exact* equality and justice is not possible in any system of taxation and no one expects it. There are many methods which may be employed and opinions differ concerning which is the best, and among these the legislature has an uncontrolled discretion. But one thing is essential to any method, and this is that it should have an *eye* to equality and uniformity. Without this, statutory enactments to compel the payment by the citizen of money in the name of taxes are mere arbitrary exactions; indeed their proper name is *robbery*, and they are none the less robbery because clothed with the exterior form of law. A law directly requiring A, B & C to pay to the State, one $1,000, another $5,000 and another $10,000, and so on, would be in no manner less reprehensible than to prescribe a method of valuing property for taxation by rules

which have no relation to value and by which a man is made to pay taxes on a horse worth $200 only, on a valuation as in the present case, of more than $4,000.

5. The opinion seems to have been entertained in the Circuit Court of Appeal, and in the Supreme Court of Ohio, that the question whether the safeguard of due process of law was satisfied amounted simply to the question whether the property owner had under the law opportunity to appear before the assessing board and be heard. No greater error could be committed. Opportunity to appear and be heard is useful only when it affords a means of correcting injustice. It is valuable only when the party can appeal effectively to truth and justice. But of what use is it when the so-called law *itself* commands the injustice to be done? An appeal to the legal enactment is to no purpose in such a case. All that the American Express Company could have done before the board would have been to urge that their horses were worth only $200 each, their wagons another sum, and so on. But the answer would have been, "We understand all that, but "what we want to know is, what is the "amount of your capital stock and what is it "selling for?"

The requirement of due process of law in the English Constitution was originally aimed, not at *legislative*, but at *executive* power. So far as Parliament is concerned, while it is a precept of wisdom to be respected, it is not an obligatory rule. In our

American constitutions it is quite otherwise. Here it is aimed at *legislative* power. Our systems, in this respect more rational and scientific, assume that life, liberty and property are secure only under the supremacy of the fundamental principles of reason and justice; that these principles have an existence wholly independent of formal law, which may either harmonize with them, or antagonize them. They assume that citizens may be robbed directly *by* law, as well as against it; that for the latter injury the law itself is a protection, but for the former it is no remedy at all, being itself the instrument of the wrong.

Where the legislative power is arbitrary and unlimited, there is, of course, no protection against it to be found in the constitutional safeguard of the Fourteenth Amendment that no person shall be deprived of life, liberty and property without due process of law. But it has been more than once declared, with the approval of this Court, that under our American systems there is no room for the exercise of arbitrary power.

The objection that men differ as to what these fundamental principles are cannot be listened to. It questions the existence of the principles, and thus utterly destroys constitutional government. We have no other ground for saying that a judicial proceeding, which denies to the defendant an opportunity to be heard, is unconstitutional, except that it violates the fundamental principles of reason and justice. But it is not true that civilized and enlightened men differ as to these principles. Upon

all material points they are agreed. Were they not thus agreed constitutional government would be impossible. They are agreed, in the main, upon all the dictates of right reason, and so far as they are not agreed, so far our constitutional systems are imperfect, as all human institutions are.

In the application, indeed, of fundamental principles of reason and justice to legal enactments there are wide differences of opinion, and the difficulty thus occasioned is surmounted, so far as it can be, by the rule that laws are not to be pronounced unconstitutional except when they are clearly violative of such principles.

Second Point.—The laws in question are very clearly in violation of the Constitution of the State of Ohio, and for this reason invalid.

1. Section 2 of Art. 12 of the Constitution of Ohio provides that "laws shall be passed, taxing, by a uniform rule, all moneys, credits, investments in bonds, joint stock companies or otherwise; and also all real and personal property, *according to its true value in money.*" The laws in question violate this injunction in two particulars, as follows:

a. Taxation in Ohio must by a *uniform rule.* This simple language is designed to

impose upon the Legislature the duty to bring about, so far as possible, the just and universally desirable end of *equality in taxation*. It does not require that all should be taxed in the same way. This would not effect equality. Different individuals engaged in widely various occupations have correspondingly different abilities to pay the taxes, and receive different degrees of benefit from the Government. The provision, however, does require that equality should be the *end in view*, and that the contrivances adopted should have some *recognizable tendency* to secure it. Different classes of persons and property may be arranged for the purposes of taxation and different methods be applied to each; but the classifications must not be arbitrary, still less designed to promote inequality.

What is true equality in reference to taxation? There can be no difference upon this point. It is the subjection of all under substantially the same circumstances to the same rule. This, and this alone, is uniformity of rule. These laws make a class of express companies, and assess them for such property as horses and wagons by a different rule from that applied to other persons using horses and wagons for other purposes, and by a different rule, indeed, from that applied to *natural persons* using horses and wagons in the same business. Such a classification is absolutely arbitrary, there being nothing in the circumstances to justify it. It has no *recognizable tendency* to secure equality in taxation, but a dis-

tinct tendency to the contrary. If express companies make more money than others using horses and wagons in their business or more than natural persons using them in the express business, it is owing to nothing in the horses or wagons, but is imputable only to the occupation and the efficiency with which it is conducted. This element is a proper subject for taxation; but it cannot be taxed by a tax on the horses and wagons. but on the occupation, or its income. It may be said, indeed, that Ohio could not follow this method on account of the inability to separate *intra* from *extra* State business. But what is this but a confession of the invalidity of the tax? It is simply declaring that what the Federal constitution prohibits Ohio from touching directly she sought to touch indirectly. But this cannot be done without violating the rule of uniformity presented by the State constitution. Those who defend this law must maintain either, *first*, that under the constitution of Ohio the Legislature may make, for the purposes of taxation, such classes as in the exercise of fully arbitrary power it pleases; or, *second*, that the value of horses and wagons owned by express companies so far differs from that of the same property owned by others as to justify the taxation of them by a different rule. Both propositions are erroneous on their face.

b. This provision of the State Constitution also requires the taxation "of all real and

personal property *according to its true value in money.* Required as we are to interpret the language of laws and constitutions according to its ordinary import, this provision can have but one meaning. The *value in money* of property, such as is the ordinary subject of sale, means the price in money at which it may be bought or sold. The provision was made to insure *one* rule of valuation, which, when applied to the same things, will produce the same result.

The proposition which those who support this law must maintain is that it is competent to the legislature to prescribe a rule of taxing horses by which an ordinary horse worth $150 may be assessed at anywhere from five dollars to $5,000!

A comparison of the language of the law with that of the constitution is at once conclusive. The constitution requires laws taxing all real and personal property at "its true value in money." The laws follow this language up to a certain point by saying that the board shall be guided by such rules as will enable them to assess the entire property of the companies in Ohio "at its true value in money," and then add, "in the proportion which the same bears to the entire property of said corporations, as determined by the value of the capital stock thereof, &c." Where is the authority to the legislature to add this qualification to the command of the constitution?

It will furthermore be seen that these statutes required the companies themselves to return to the board the value of their

property in Ohio. In this requirement no special mode was pointed out by which the value was to be ascertained. None was needed. Every one understands what is meant by *value* of ordinary chattels. It is what they are bought and sold for. This is the value intended by this particular requirement. It is the value plainly indicated in the language of the Constitution. The return placed this value presumably before the assessing board. Undoubtedly the board was in duty bound to see whether this was the true value, in case of any suspicion as to the correctness of the return. What the Nichols Laws require is that this value, even though correct and in perfect accordance with the constitutional requirement, be immediately discarded, and used only as one of the elements of a *proportion*, designed to obtain a valuation !

3. There is, indeed, a suggestion in the opinion of the Supreme Court of Ohio of a way in which the difficulty last mentioned is supposed to be avoided. This is that the *things* really assessed and taxed against the American Express Company were not, in fact, horses, wagons, &c., but were a certain other *thing*, namely, a certain aliquot part of the whole property, treated as a "unit profit-producing plant" of that company, and that this was, presumably, assessed at its true value in money.

The phrase just quoted is not employed by the Supreme Court of Ohio, but by the Cir-

cuit Court, but it happily describes the notion invented by the former Court and adopted and sanctioned by the latter. This singular notion will be hereafter dealt with under another head. It is enough to say here that it is an absurdity neither less nor more palpable than the others we have dealt with.

In the interpretation of laws we must assume that the legislature deals with the world and with the things in it as they exist, and does not include in its purview a fictitious, or supposititious world, in which things are arranged without reference to their actual qualities, distinctions and names; and consequently that by "all personal property," it means all such things as domestic animals, tools, utensils and other tangible and movable things, debts, credits, &c., and that it requires their valuation in these their natural categories. Otherwise, one horse may be named, assessed and taxed, as an aliquot part of one dividend-producing unit at $10, another of the same quality and value as an aliquot part of another "dividend producing unit" at $1,000, and all other articles treated in a similar manner, so that the term, horse, wagon, harness, and the names of all other tangible and movable things cease to have any signification so far as taxation is concerned.

The property mentioned in the Constitution of Ohio is *specific* property having an actual existence *in rerum natura*, which may be *occupied*, where it is real estate, touched and handled in the case of chattels, and received or recovered, in the case of debts and credits from, or by action against actual persons who owe them. The property

which, according to the motion under criticism, is taxed, is a pure abstraction having no *situs*, no existence even, save in intellectual conception, something which can nowhere be seen, or handled, or made the subject of action. Will any one seriously say that this is what was intended by the language of the constitution, or that such fictions can be made the subject of taxation?

This notion is but another mode of abrogating constitutional law by changing at pleasure the meaning of words. It could easily be done if legislatures had the power of thus changing the meaning of language.

4. The notion above dealt with is really the main error underlying the mode of assessment prescribed and followed in this case. It was the foundation of the reasoning of the Ohio Supreme Court, and seems to have been accepted both by Judge Taft in the Circuit Court and by the Circuit Court of Appeals. To a certain extent it may be a correct view, and therefore it is important to consider in what cases and how far it may be correct, and when it becomes inapplicable. The view is thus expressed by the Supreme Court of Ohio. "But the property of a corporation "(and what is meant is the property of all "corporations) *may be regarded* (for tax- "ation) in the aggregate, as a unit, an "entirety, as a plant designed for a specific "object, and its value may be estimated, not "in parts, but taken as a whole." And the Court means that different *parts of this entirety* situated in different States may be

taxed as such *parts*, irrespective of the elements of which such parts are composed.

The question then is whether the property of corporations may be thus "*regarded*." Our answer to it is the simple one that it may be, if it is so, as it often is, *in fact*. But it cannot be so treated by an act of *violence* through the mere interposition of an *intellectual, legal fiction*.

Things as they actually exist may be transformed, and are constantly being transformed, into other things, and when these changes are effected, corresponding changes may and should be made in the taxation of them. A rod of iron when wrought into a horseshoe, is no longer a rod of iron, nor to be valued as such, but as a horseshoe. A pile of pig iron is to be valued as such, but when a steam engine is made of it it is no longer pig iron, and the steam engine, although composed of the iron and other metal and wood, is a separate and distinct thing, which must be valued as such. Its parts cannot be separated in taxation, nor can it be valued by the value of the materials of which it is composed. It may be a good and effective machine, and its true money value very great, or a poorly constructed one and comparatively worthless. A horse and wagon may be *conceived of* as a unit, but they are *not* a unit in fact, and can not be treated as one for the purposes of taxation. The *units* dealt with in taxation must be the units actually existing in nature as units. What then is a *unit?* It is something from which if a part be taken the unit is destroyed, and the separate parts are not complete units in themselves. If the parts

of a steam engine be separated from each other and damaged it is no longer a steam engine for the purposes of taxation, and the piston rod no longer possesses, in itself, the value it contributed to the machine. A railroad is composed of a property interest in particular lands, iron rails, ties, &c., and may be properly regarded as a unit for the purposes of taxation. The ties and iron rails have lost their identity and character as marketable property which they had before they were laid, and they may, or may not, have communicated as much value to the new unit into which they have entered as they before possessed. The Supreme Court of Ohio and the Circuit Court of Appeal seem to think that because a railroad company may be regarded as a unit for the purposes of taxation on property, an express company, and, indeed, all corporations, may also be so treated. But not so. The whole railway property is a unit *in fact*, the whole express company property is a *fictitious* unit having no existence save in intellectual contemplation; it is not a *thing* at all, but many distinct and separate things, the only bond of connection between them being that they are *used together*. A horse and wagon are not a unit for the purposes of taxation but two distinct units. The horses of the express company may be sold by it, and they will yet retain all their distinctive characteristics and value; and so likewise of its other personal property. The bonds and stocks, debts and credits which it owns are all distinct units which would possess the same value under whatever ownership.

The error, therefore, of regarding the express company property as a unit, is that it is not a unit *in fact*, but made so *violently* by the mere will of the Ohio Legislature, and against the express provision of the constitution of that State. If it can commit this violence in one case it can in all, and all protection against unjust taxation is gone. If it can tax the property of the express companies upon this *unit* principle it can with equal right tax the property of every other corporation, in or out of Ohio, which classes hundreds in that State upon the same principle.

There is, indeed, a purpose for which many different items of separable and distinct things may be regarded and treated in the aggregate as a unit. This is the precise thing done in the capitalization and division into shares of corporate property. Each share represents an undivided interest in the whole corporate property including its franchises, goodwill, contracts, facilities and personal and real property, everything, in short, which affects its capacity to make an income. The sale of a share transfers this interest, and such interests are taxable as such, but only in States where they have a *situs*.

As we shall hereafter see, the real object of the laws we are complaining of, and the real object accomplished if they are valid, was to reach property in this form. The laws are framed to embrace corporations notoriously of other States than Ohio, neither whose property generally, or whose capital stock, or the shares of stockholders not resident in Ohio, were taxable in that State. It

is, of course, quite manifest that the Ohio Legislature would never have contrived the elaborate and anomalous provision for valuation contained in the Nichols Laws if it could have directly reached the capital stock of the companies.

The case of such corporations as railroad companies is totally different. That the roads of such a corporation lying in a State other than that in which they were chartered should be taxed where they lie is plain. But a piece of a railroad cannot be taxed as a distinct and separate thing because it is not *in fact* a separate and distinct thing, and cannot be treated as such. It cannot be bought or sold as such, and has no value as such. The iron and the rails, after they have been laid, have no value in money as laid. If taken up they would be salable; but this would make them different things. They, together with the easement in the lands on which they are laid, are an inseparable part of an entirety, namely, the whole railroad and the value for the purposes of taxation can be ascertained only by reference to the value of the unity itself. There are several modes of reaching this, any of which the Legislature has a discretion to select.

5. This notion of a "unit profit-producing plant," upon which, and which alone, any defense is made by the Supreme Court of Ohio of these assessments, if it could by possibility defend them, could do so only if adhered to throughout. But it is not so ad-

hered to. It is adopted only in the case of *personal* property, and rejected so far as relates to *real* property. The law assumes that the real estate of the companies is assessed like other real estate, by other officers, where it is situated. The board created by the Nichols Laws is not required to make and return any separate assessment of that. But the companies are required to include it in their returns, and to state its value "as assessed for taxation" (Exhibit Book, pp. 2 and 7). The board then makes out the value of the *whole* property in Ohio by a proportion of the value of the capital stock equal to the proportion which the whole property in Ohio bears to the entire property of the company. The aliquot part of the "unit profit-producing plant" to be taxed in Ohio embraces real as well as personal estate. The board then returns to the auditor the valuation thus reached and its work is done. The auditor then proceeds to deduct from the valuation the assessed value of the real estate which is left to be taxed specifically as other such property is taxed and apportions the remainder among the several counties. The "unit profit-producing plant" idea is thus adopted in obtaining a *valuation* of the whole property in Ohio to be taxed, but when this valuation is obtained it is immediately discarded so far as real property is concerned. If the absurd proposition that the value of the whole property of the company in Ohio is properly ascertained by the *proportion* which these laws erect into the test of value could be maintained, the *whole* of such property should be taxed according to the valuation

reached by, the application of that proportion or none of it, for when part of the property is taken out and taxed by another rule the correctness of the valuation of the remainder, even on its own theory, is gone. For instance, let it be assumed that a company with a capital stock of $1,000,000, has in Ohio according to a just valuation $100,000 of property, $50,000 real, and $50,000 personal. A moderate achievement of the purpose designed by this "unit profit-producing plant" system would make the value of this aliquot part of the whole property of the company $400,000, an exaggeration far less than that actually brought about in the case of the American Express Company. In the final taxation the assessed value of the real estate which we may assume to coincide with its actual value, $50,000, is deducted, and left to be collected as taxes on other real estate are collected. This leaves $350,000 to be assessed on *personalty* But the real value of the personalty was $50,000, and consequently it follows that such real value, instead of being exaggerated four times, as it would be with the real estate left in, is exaggerated as many times as $50,000 is contained in $350,000, that is six and one-half times! Consistency of this system with itself would require that when the valuation of the real estate was deducted the exaggerated valuation of the board should be deducted, instead of the valuation as assessed by the local assessors. Otherwise there is a case, not only of exaggerated valuation, but of double taxation besides. The real estate is first used to swell the val-

nation of the whole property in Ohio, real as well as personal, and is thus really taxed under the name of personalty, and again taxed as specific real estate.

The argument under this point is equally applicable in support of the First Point.

Third Point.—The laws in question impose taxes on property beyond the territorial jurisdiction of Ohio and are invalid for this reason.

1. We have thus far treated the law as *purporting* to tax property within the territory of the State; we are now to inquire what property it actually taxes and whether such property is in fact within the jurisdiction.

Although taxes are commonly, and rightfully enough for most purposes, said to be *upon property*, or other things such as *business*, *occupation* or *income*, this is only true in a certain sense. Taxes are always upon persons. They create pecuniary obligations upon persons which are satisfied out of such means as the persons taxed choose to apply for that purpose, and whatever the tax is said to be *upon*, it is paid out of the same means. The real thing intended when it is said that a tax is *upon* anything is that the existence of that thing is the *cause* of the tax, and that its amount, where the amount is variable, depends upon the amount or value of that interest in the hands of the person taxed. Thus, a tax on account of the ownership of property depends upon the

amount and value of the property owned, and is, therefore, said to be a tax upon property. A tax on account of income depends upon the existence of an income and its amount, and is, therefore, said to be a tax upon income; and a tax upon the gross rereipts of a business depends upon the carrying on of that business and the amount of the gross receipts, and is, therefore, called a tax upon business or on gross receipts.

In order, therefore, to know what a tax is *upon* we must ascertain the thing on account of which it is imposed and upon the extent or amount of which the amount of the tax is made to depend.

2. What the tax under notice is really upon, is what the Supreme Court of Ohio regards as the "unit profit-producing plant" of the Express Company, embracing all its properties and all those advantages which enable it to make an income and promise a permanency to such income, and the value of which is very accurately measured by the market value of the stock of the company. In other words, it is a tax upon *capital stock*, for unless such capital stock existed, this tax could not be imposed, and the amount of the tax varies in precise conformity to variations in the value of the capital stock. Any increase or diminution in the value of the capital stock must increase or diminish correspondingly the amount of the tax, but any increase of the property of the company which did not increase the value of the shares would not increase the tax. If the

increase of property were in Ohio alone it might increase the amount taken, but simply because it would affect the *proportion* of that part of the plant in Ohio to the whole plant; that is, the tax would be the same, but the proportion of property larger.

But if, without an additional thing being done in Ohio, the business of this express company were elsewhere extended, involving the purchase of horses, wagons, &c., to the amount of $100,000, the amount of the Ohio tax would be immediately and *necessarily* increased. Who will say that such a tax is not upon property outside of the jurisdiction of the State?

Fourth Point.—The laws authorizing the assessments are invalid as an invasion of the constitutional guaranty of the equal protection of the laws.

1. Practically the two constitutional provisions which forbid the taking by any State, of life, liberty or property without due process of law, and the denial by any State of the equal protection of the laws are very nearly the same. They are contained in the same enactment and were designed to more fully secure the same object. Every infringement of fundamental rights by State legislation, taking life, liberty, or property without due process of law must, almost of necessity, be a denial of the equal protection of the laws,

for we can hardly conceive of the possibility of a State enactment thus taking life, liberty and property *equally* from *all*. The evil to be apprehended from popular legislation is that a majority may invade the fundamental rights of a minority. But while a taking of life, liberty or property by a State enactment without due process of law is at the same time usually, if not invariably, a denial of the equal protection of the laws, there may be many forms of a denial of the equal protection of the laws which would not, at the same time, be a taking of either life, liberty or property without due process of law. The former safeguard protects certain fundamental rights; the latter is designed to secure *equality* not only in respect to *burdens* but *benefits* also. Whatever the law vouchsafes to one, must be extended to all.

Neither of these maxims prevent regulation, whether in respect to taxation or other concerns, applicable only to *classes* of persons, occupations, &c. As the concerns of life present multitudes of variations, legislation must often be varied accordingly; but, under the pretence of classification for the purposes of beneficial legislation, it is easy to make arbitrary classifications, or classifications designed for the purpose of imposing special burdens or securing special benefits. This form of misgovernment is the precise thing which the safeguard of the equal protection of the laws was designed to prevent. Prior to its adoption many attempts had been made, directly and indirectly, by State legislation to form a *class* of men openly or covertly *designed* to embrace black men only, and to impose upon them

an inequality *because* they were black. This was nothing but a *false classification*—false, because the distinction was no just basis for legislation creating a difference of any sort in respect of burdens or benefits. It was the wisdom of those who framed the Fourteenth Amendment to see that the true remedy for this injustice was to be found, not in any safeguard available to black men in particular, but in one which should be available to all alike. *Equality*, therefore, in every point which the law could touch was made a fundamental principle of American liberty. It had long been so in the general thought and conscience of the nation.

2. Prior to this amendment the most common, if not the only, form in which this principle had been offended (aside from slavery) was in the matter of taxation. Territorial districts would be formed which favored or burdened some more than others, and even, perhaps, so designed. Occupations would be selected and made into classes, assessing officers would exercise partiality towards some and disfavor to others. In all such cases the injustice would be effected where it was done by law, through the instrumentality of some *false classification*. To remedy this evil the same means was employed as in the case of the national constitutional safeguard under notice. Provisions were incorporated in many State Constitutions requiring *equality* and *uniformity* in taxation. This was not because equality in *all* political rights and privileges was not important; but

because they were more especially important in the matter of taxation, and were in that particular more likely to be denied.

The provision of the Ohio Constitution is an apt illustration. It affirmatively required the legislature to pass laws "taxing by a *uniform rule* all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property, according to its true value in money."

The design and effect of the Federal amendment was to bring about, in reference to *all political rights and privileges*, the same equality which the Ohio Constitution ordained in respect to taxation.

3. By the laws under discussion the personal property of express companies is taken out of the general category of property, and, with that of certain other companies, placed in a special class, and a special rule of valuation applied to it under which it is valued at a sum twenty-fold greater than it would be if owned by individuals or other corporations. If this property, when owned by express companies, has or may have a much larger value in money than if it were owned by other individuals or corporations, this special treatment of it may be no denial to those companies of the equal protection of the laws; but if there is nothing in such occupation to enhance its value, then the law is an utter denial of such equality; for while the law insures to individuals and corporations in general the valuation of property at its true

value in money according to its *selling* price, and protects them against any other mode of valuation (Ohio Statutes, §§ 2739, 2744; Ex. Book, pp. 18, 21), it denies it to express companies.

But the notion that ordinary personal property is more valuable to express companies than to other persons in a sense that justifies a different valuation for taxation is an unmixed error. They are doubtless very valuable to such companies; more than that, they are necessary; but they are in like manner valuable and necessary to multitudes of persons. Nothing can make them more valuable for the purposes of taxation than the price at which they are bought and sold. If there were but few obtainable, if the supply was limited, they would be more valuable, for the price would rise accordingly.

4. The Supreme Court of Ohio felt that in order to sustain these extraordinary impositions, it was necessary to offer some reason justifying the placing of this property in a special class. It knew that such a thing could not be done arbitrarily. In its extremity it fell into the error of imparting to particular property as a part of its own inherent possessions qualities which do not at all belong to it, but to totally different things.

As this error is a vital one, we must be careful to show that the Court committed it, and must make for this purpose a liberal quotation from the decision. Following up its device of treating the whole property and franchises of a company as a unit, it says:

"If by reason of the good will of the con-
"cern, or the skill, experience and energy
"with which its business is conducted, the
"market value of the capital stock is largely
"increased, *whereby* the value of the *tang-*
"*ible property* of the corporation, treated as
"an entire plant, acquires a greater market
"value than it otherwise would have had, it
"cannot properly be said not to be its true
"value in money within the meaning of the
"Constitution, because good will and other
"elements indirectly entered into its value"
(Ex. Book, p. 137).

But the good will, skill, experience and energy of these express companies are not the qualities or characteristics of the horses and wagons they employ, but of the persons who conduct the business, and they do not add in any degree to the value of such horses and wagons. None of them will sell for a dollar more or less on account of these valuable qualities which are possessed by their owners.

The Court immediately proceeds to state the true view, as if it were in harmony with the above extract. It says: "The
"market value of property is what *it will*
"*bring when sold as such property is ordi-*
"*narily sold in the community where it is*
"*situated*, and the fact that it is its market
"value cannot be questioned because attrib-
"uted somewhat to good will, franchise,
"skillful management of the property, or
"any other legitimate agency."

Aside from the implication that the value of property, such as horses, wagons, &c., may be enhanced by the way in which they are used, the above extract is entirely true.

It is the price in the market which determines the value, and any inquiry into the causes which make the price are wholly irrelevant.

The Court further exhibits the confusion and error into which it had fallen by the illustration which it employs. It says: "It "will, we think, be conceded that the own- "ing capacity of real estate owned by indi- "viduals may be considered in fixing its "value for taxation. Take an office building "on a prominent street in one of our large "cities. It will not be doubted that by care "in the selection of tenants and in the pre- "servation of the reputation of the building, "by superior elevator service, by vigilance "in guarding and protecting the property, "by the exercise of skill and knowledge in "the general management of the premises, a "good will of the establishment will be "promoted which will tend to an extra in- "crease in the earning capacity and value of "the building. For the purpose of taxation "it would none the less be the true value in "money of the building because contributed "to by the operative causes that gave rise to "the good will" (Ex. Brooke, p. 137). Certainly not if by reason of any of these things the building would sell for more money. That is the absolute and only test. But none of these things would ordinarily, if ever, affect the market price of the property. The qualities mentioned are not inherent in the property, but in individuals who may own it. What determines the price of the property is its *capacity* when managed with skill and prudence to produce an income. The price does not depend on the fact that money

is made out of the ownership of the property, but upon the *possibilty*, owing to the inherent nature of the property of making money out of it. Take two large office buildings adjoining each other in all particulars alike, except that one is well managed and makes money and the other ill managed and loses it; will the former bring a larger market price than the other? Or is there any justification in assessing one for taxation at a higher value than the other? Certainly not, unless it is a sound public policy to burden and discourage industry and thrift. And so with horses, a horse worth in the market $150 will produce that sum whether owned by an energetic teamster, or by a drunken drone, and should be valued at the same sum for taxation.

5. If the foregoing views are well founded it follows that the laws under discussion deny to one class of property owners that assurance that their property shall be assessed according to its true value which it furnishes to others.

Fifth Point.—The laws under which these assessments were made are invalid also for the reason that they impose a burden upon interstate commerce.

1. There is no constitutional provision in terms forbidding the States to impose burdens by

way of taxation upon interstate commerce. The prohibition is a necessary implication arising from the fact that the subject matter is one placed exclusively under the sovereign control of Congress, and the imposition of burdens upon it by the States, whether by taxation or otherwise, would be a denial of that sovereignty and a false assumption by the States of a power over it, which, if it existed, might be so exercised as to destroy it.

2. There is one necessary exception to the rule that the States cannot tax interstate commerce. Inasmuch as the existence of the States is necessary to the existence of interstate commerce, that ordinary system of taxation which is necessary to the existence of the States, namely, taxation upon all the property within them, must be permitted, and the property employed in inter-State commerce is not to be exempted. This exception is, indeed, rather apparent than real; for where no burden can be put upon property employed in interstate commerce without being at the same time put upon all other property, interstate commerce is not really burdened. Were it not subject to taxation in this form the effect, would be to confer upon it an affirmative advantage equivalent to a pecuniary bounty equal to the amount of the tax from which it was exempted.

3. But a tax in any other form cannot be thus

equalized over all private interests, and, if allowed, would be, or might easily be made to be, an especial burden.

4. The taxes levied by these Ohio laws are taxes directly depending upon the market value of the shares of the stockholders. That market value depends directly upon the present profits of the business and the fair expectation concerning its permanency. It is, very precisely, a *capitalization* of all the property and every advantage whether by way of franchise, contract privilege or skill possessed by the company. Among these advantages is the *fact* that the privilege of carrying it on is derived from and controlled by another sovereign government. A tax, therefore, upon a capitalization of all these elements is a tax upon the occupation itself, which it is certain that the States have no right to impose.

5. The practical test is conclusive. The question is whether the taxes are a burden. Every one can see that if all the States should impose taxes similar to those we are dealing with (and if one State can do it all may), the business would be immediately destroyed. No express company could stand such an aggregate of taxation.

Lastly.—The decrees of the Courts below should be reversed and the cause remanded with instructions that the demurrer be overruled, with costs in all the counts.

JAMES C. CARTER,
Of Counsel for Appellant.

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The Supreme Court of the United States.

OCTOBER TERM, 1896.

THE WESTERN UNION TELEGRAPH COMPANY, *Appellant*,

No. 352. *vs.*

EBENEZER W. POE, Auditor of the State of Ohio, JOHN K. RICHARDS, Attorney-General, and WILLIAM T. COPE, State Treasurer.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

SAME,

No. 405. *vs.*

EBENEZER W. POE, Auditor of the State of Ohio, WILLIAM H. HALLIDAY, Auditor of Franklin County, and others, County Auditors.

SAME,

No. 401. *vs.*

EBENEZER W. POE, Auditor of the State of Ohio.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR THE APPELLANT.

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EBENEZER W. POE, Auditor of the State of Ohio.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR THE APPELLANT.

These are three bills to enjoin the assessment of taxes against the Western Union Telegraph Company, under the statute of Ohio, commonly known as the Nichols law (90 O. L. 330; 91 O. L. 220; Exhibit Book 1, 6). No. 352 covers the assessment for the year 1893, No. 405 the assessment for 1894, and No. 401 the assessment for 1895.

The merits of the cases, as affected by the validity of the statute, are discussed in our brief on behalf of the express companies, in cases Nos. 398, 399, and 400, which are to be heard with these cases. We content ourselves, therefore, with adding some observations peculiar to the case of the Telegraph Company.

The assessment against the Telegraph Company for the year 1893 is based upon a mathematical calculation disclosed in the affidavit of E. W. Poe (No. 352, Record 17). And the same is true of the assessments for 1894 and 1895.

The assessors deducted from the total market value of the plaintiff's capital stock the value of its investments in bonds and stocks of other corporations, and the value of the real estate owned by it outside of Ohio, and apportioned the residue for taxation in the state of Ohio, in the proportion of the length of its lines in Ohio to the length of its lines throughout the world.

The circuit judge, in an elaborate opinion, reached the conclusion that "this appraisement was not an appraisement of the property of the company in Ohio at all;" that "taxation by such a measure of value is an income tax, and not a property ad valorem tax." (Exhibit Book 68.)

The calculation presented by the board of assessors shows that they followed implicitly the rule prescribed by the statute; in other words, that they estimated the total value of all of the lines of the company upon the basis of the market value of its capital stock, and apportioned to the state of Ohio the mathematical proportion which the lines of the company in that state bears to its total lines throughout the world.

There are two errors in this calculation; the first in assum-

ing that the value of the capital stock, especially the market value, is the same thing as the value of the assets of the company, and the second, in assuming that the value of the lines in Ohio is the proportion of the value of all the company's lines, which the lines in Ohio bear, in mileage, to all of the lines.

The first of these errors is discussed in our brief on behalf of the express companies. The argument, however, is enforced by the showing made in the return of the Telegraph Company to the state board, of the fluctuations in the market value of its capital stock, wholly without reference to any conditions affecting the value of the company's lines. (No. 352 Exhibit B to bill, Record 7.)

The second error, relating to the apportionment of the total valuation to Ohio, depends somewhat on the facts presented in the bill and in Exhibit B. It may be that the portion, in Ohio, of a telegraph line running from Columbus, Ohio, to Indianapolis, Indiana, can be fairly estimated by dividing the total valuation upon the mileage basis, because that is a single line. But it does not follow that the value of the lines in Ohio can be ascertained by taking their mileage proportion of all the lines in the world.

So far as the element of cost affects the conclusion, the return of the company to the state board shows that "while the cost per mile can in the state of Ohio, or in any other one state, be averaged with substantial accuracy because the conditions existing are there substantially uniform, no such rule can apply to the company's lines as a whole. Thousands of miles of line lie in cables under the high seas, costing about $4,000 per mile; in the more densely settled portions of the country, like Massachusetts, New York, Pennsylvania and

New Jersey, where also the company's trunk lines are larger, the cost per mile of poles is vastly greater, as it also is per mile of lines where laid underground in conduits." (No. 352, Record 10, and similarly in Nos. 401 and 405.)

So far as the value is affected by earning power, the same report shows "that while the gross receipts of the company's business throughout its entire system average $32 per mile of wire, in Ohio the average is $22.12 per mile of wire, and that the net earnings of the entire system average $10 per mile of wire, but in Ohio do not exceed $5.78 per mile of wire."

The clear purpose of the legislature was to add something to the cash value of specific property, for it is provided in section 2778a that, after determining the value of the specific property in the state, which is to be taxed, this sum shall be " in the proportion which the same bears to the entire property of said corporation, as determined by the value of the capital stock thereof." But why should the value of the corporate property in the state, when ascertained, be increased by anything? We submit that it is not competent for the state of Ohio, either directly or indirectly, to add anything to the value of the company's property within this state, and especially not to discriminate against express and telegraph companies by directing that, in the case of those companies, there shall be added something which is not added to the valuations made against any other persons, associations or corporations doing business or having property in the state.

We respectfully submit that the judgments should be reversed.

LAWRENCE MAXWELL, JR.

Supreme Court, U. S.
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The Supreme Court of the United States.

OCTOBER TERM, 1896.

Nos. 398, 399, 400.

EXPRESS COMPANY TAX CASES, UNDER THE NICHOLS LAW OF OHIO.

BRIEF FOR THE EXPRESS COMPANIES.

"Express Companies have no tangible property, of any consequence, subject to taxation under the general laws." 142 U. S. 354.

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The Supreme Court of the United States.

OCTOBER TERM, 1896.

CLARENCE A. SEWARD, Vice-President of the Adams Express Company, *Appellant*,

No. 398. *vs.*

EBENEZER W. POE, Auditor of the State of Ohio, *Appellee*.

JAMES C. FARGO, President of the American Express Company, *Appellant*,

No. 399. *vs.*

SAME.

THOMAS C. PLATT, President of the United States Express Company, *Appellant*,

No. 400. *vs.*

SAME.

Appeals from the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR THE APPELLANTS.

STATEMENT OF THE CASE.

These are bills filed on behalf of the Adams Express Company (No. 398), the American Express Company (No. 399), and the United States Express Company (No. 400), to enjoin the assessment of taxes against them for the year 1895, under the statute of Ohio, passed May 10, 1894, commonly known as the Nichols law (91 O. L. 220; Exhibit Book 6.) The cases come into this court on appeal from decrees of the circuit court sustaining demurrers to the bills. They are to be heard in connection with the case of the Adams Express Company (No. 337), to enjoin

an assessment against it for the year 1893, under a similar law, and with the cases of the Adams Express Company (No. 338), the American Express Company (No. 339), and the United States Express Company (No. 340), to enjoin assessments against them, under the same law, for 1894.

The bills aver, and the demurrers admit, that, aside from certain real estate owned and used by the plaintiffs for stabling purposes (which has been duly assessed for taxation and the taxes on which have been paid), the plaintiffs "have no property in the state of Ohio except certain horses, wagons, harness, and trucks, which are used by them in the collection and delivery of packages in the various towns and cities;" that "there is nothing peculiar about any of said property, which is of the ordinary kind, whose true value in money can be easily ascertained and determined by ordinary standards;" that the true value of all such property owned by the plaintiffs, together with their moneys and credits, within the state, amounts, in the case of the Adams Express Company to $42,065, in the case of the American Express Company to $23,430, and in the case of the United States Express Company to $28,438, but that the state board of appraisers and assessors have assessed the plaintiffs on account of their property as follows: The Adams Express Company $533,095.80, the American Express Company $499,373.60, the United States Express Company $488,264.70. The following table shows the disparity between the value of the plaintiffs' property, as alleged in the bills and admitted by the demurrers, and the assessments made against the plaintiffs, viz:

1893.

	Value as returned, and as alleged in the bills.	Assessment.
Adams Express Co. . . .	$53,080 74	$460,033 08
American Express Co. . .	27,300 00	400,576 45
U. S. Express Co.	26,318 00	397,300 00

1894.		
Adams Express Co. . . .	$41,102 60	$543,569 00
American Express Co. . .	21,795 00	446,142 00
U. S. Express Co.	26,333 00	481,348 00
1895.		
Adams Express Co. . . .	$42,065 00	$533,095 80
American Express Co. . .	23,430 00	499,373 60
U. S. Express Co.	28,438 00	488,264 70

These extravagant assessments are brought about under the operation of the statute complained of (Nichols law), which requires every express company doing business in the state to return, in addition to "a full and correct inventory of the personal property, including moneys and credits, owned by the company in Ohio, on the first day of May, where situate and the value thereof," a statement showing the number of shares of the company's capital stock; the par value and the market value, or, if there be no market value, the actual value of its shares of stock; the total value of real estate owned by the company and situate outside of Ohio; the total value of personal property owned by the company and situate outside of Ohio; the entire gross receipts of the company from whatever source derived for the preceding year, of business wherever done; the gross receipts for the preceding year, from whatever source derived, of each office within the state of Ohio, and the total gross receipts of the company for the year in Ohio; and the whole length of lines of rail and water routes over which the company did business during the year, and the length of so much of said lines as is within and without the state, naming the lines in Ohio.

With these data before them the state board of appraisers and assessors are directed by the statute to "proceed to ascertain and assess the value of the property of said express, telegraph and telephone companies in Ohio, and in deter-

mining the value of the property of said companies in this state, to be taxed within the state, and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid." (Nichols law, sec. 2778a; Exhibit Book 8.)

The bills insist that in ascertaining and determining the value of the plaintiffs' property for taxation it is neither necessary nor proper, as contemplated by the Nichols law, to take into consideration either the par or market value of the companies' shares, or the character and amount of their property, real or personal, in other states, or the amount of their gross receipts in Ohio or elsewhere, but that their property should be valued as similar property is valued in the hands of all other owners; that a horse is a horse, harness is harness, a wagon is a wagon, a truck is a truck and a safe is a safe, whether owned by an express company or by any other person or association, and that the value of such property should be ascertained for purposes of taxation against express companies, according to the true value of the articles, as determined by their market price, which is the method adopted by the state in valuing similar property, and all other property, in the hands of all other persons, associations and corporations.

The bills aver that the assessments against the plaintiffs were not made, or intended to be made, by the state board upon the basis of the value of the plaintiffs' property within the state, or upon any estimate of the value of their prop-

erty, as property, but altogether upon other considerations, and that the sums assessed were not arrived at by any process of valuation, calculation or apportionment, but are amounts determined by the board arbitrarily, upon the simple consideration that the plaintiffs, in view of the market value of their shares, should pay in the state of Ohio a tax on the basis of the assessments so made by the state board, wholly without reference to the value of any property owned by the plaintiffs within the state.

The bills insist that the Nichols law, while professing to provide for the taxation of property that is within the state of Ohio, does not in fact do so, because it directs the state board of appraisers, in determining the value of the property of express companies in Ohio, for purposes of taxation, to be "guided by the value of said property as determined by the value of the entire capital stock of said companies . . . in the proportion which the same (to-wit, the property of the companies within the state) bears to the entire property of said companies, as determined by the value of the capital stock thereof;" whereas, according to the claim of the bills, the value of the capital stock or shares of the plaintiffs, and of express companies generally, is determined, not so much by the value of the property and appliances which they use in carrying on their business, as by the skill, diligence, fidelity and success with which they conduct their business. The bills show that the plaintiffs employ many thousands of men who are constantly engaged in carrying express packages, many of them of great value, from one part of the country to another, and that the income of the companies and the value of their shares are largely the result of the efforts, fidelity and integrity of these employes, and of skillful management and supervision of the business; also that the plaintiffs own real estate and personal property of great value,

aside from the appliances of their express business, which is not held or taxable in the state of Ohio, some of which is not taxable at all, all of which, however, together with the business connections of the plaintiffs and the reputation and good-will which they have earned in the course of long public service, enter largely into the value of their capital shares.

As a conclusion of the whole matter, the bills insist that the Nichols law and the assessments made thereunder against the plaintiffs, and complained of in the bills, are in contravention, not only of the constitution of Ohio, but of the constitution of the United States, especially of the interstate commerce clause of section 8, article 1; of section 2, article 4; and of section 1, article 14, upon the ground that the law provides for the assessment of, and the assessments complained of in the bills embrace, property not situated within the jurisdiction of the state of Ohio; that it provides for the assessment of property for taxation, and the taxation thereof, and the assessments made by the state board deliberately and intentionally assess the plaintiffs' property for taxation, without regard to its value and in excess of its value; and that it provides for the assessment of the property of express companies for taxation in a manner and by a method different from the manner and method provided and required by the laws of the state of Ohio in respect of the same kind of property owned by other persons within the state, of which the same use is made, under the came circumstances and conditions.

It is specifically alleged that the assessments are not, in fact, assessments against the plaintiffs in respect of their property held and owned by them in the state of Ohio, but that they are really and deliberately and intentionally an attempt to enforce against the plaintiffs, under the guise of taxing their property within the state, the payment of a

tax upon their business, which is largely interstate commerce, or a tax for the privilege of doing such business in Ohio, by placing a fictitious and artificial value upon their property.

It will be noticed that the assessments complained of are not round sums, but exact amounts, in each case an odd number of dollars and cents. The bills charge that the state board adopted these apparently precise figures for the sole purpose of giving to the assessments the semblance of having been arrived at by some process of valuation, calculation or apportionment, but that the assessments are really arbitrary and capricious. Support to this view is given by the correspondence between the state board and the counsel for the express companies, which is made an exhibit to the bills (No. 398, Record 63–67). Counsel for the plaintiffs, after having been notified of the amounts of the assessments made against the various express companies by the letter of the secretary of the state board, of August 7, 1895, asked the board (letter of August 10, 1895, No. 398, Record 64), "to know upon what calculation, if any, the apparently precise amounts of the assessments, especially in the case of the express companies, are based, and how the figures are arrived at." Although the state board subsequently addressed two letters to Mr. Maxwell, they failed to answer this simple question. We submit that we are entitled to conclude that the apparently precise amounts of the assessments were not the result of any calculation. The assessment against the American Express Company, for instance, is not an even $500,000, but the odd sum of $499,373.60. If this sum is not an arbitrary and capricious assessment, but the result of some precise calculation, it would have been easy enough for the state board to disclose that calculation, and it would have been the duty of the board to do so, in order that the ex-

press company might have applied intelligently for a correction of the assessment. The same remarks apply to the assessment made against the Adams Express Company, which is not a round sum, but the apparently precise amount of $538,095.80. The assessment against the United States Express Company is not a round sum, but $488,264.70.

ASSIGNMENT OF ERROR.

Plaintiffs assign for error that the circuit court erred in sustaining the demurrers to the bills and in dismissing the bills, insisting especially that the assessments complained of are not in fact assessments against the plaintiffs in respect of their property held or owned by them in the state of Ohio, or within the taxing jurisdiction of that state, but that the assessments are really an attempt, under the guise of taxing the plaintiffs' property within the state, to enforce against them the payment of a tax upon their business, which is largely interstate commerce, or for the privilege of doing such business in the state of Ohio, by placing a fictitious and artificial value upon their property; and that the assessments, and the statute of Ohio purporting to authorize them, are therefore in contravention of the constitution of the United States, especially of the interstate commerce clause of section 8, article 1, and of section 2, article 4, and of section 1, article 14. (No. 398, Record 69.) Similar assignments of error are filed in Nos. 399 and 400.

Judge Taft, in a well considered opinion, originally held the Nichols act to be in contravention of the constitution of the state of Ohio, upon the ground that it did not provide for the taxation of the property of express companies, according to its true value in money. He subsequently withdrew that opinion in deference to the decision

of the supreme court of Ohio, in the case of State *vs.* Jones, 51 Ohio St. 492. For the convenience of the court and counsel we have printed in a separate pamphlet (labeled and hereinafter referred to as Exhibit Book) the several opinions delivered by Judge Taft in the circuit court, and by the circuit court of appeals in Nos. 337 (the Adams case for 1893), 338, 339 and 340 (the express company cases for 1894), as well as the opinion of the supreme court of Ohio in State *ex rel. vs.* Jones, the Nichols laws of 1893 and of 1894, and the statutes of Ohio in force in those years, governing the taxation of all other property than that of express, telephone and telegraph companies. We print these statutes with a view to showing the court the special and discriminating character of the rule of assessment prescribed by the Nichols law against express companies.

All the questions are open in this court.

The appeals are taken directly to this court from the circuit court, under sec. 5 of the act of March 3, 1891, c. 517, to establish circuit courts of appeals (26 Stat. 826), because the cases "involve the construction or application of the constitution of the United States," and also because they are "cases in which the law of a state is claimed to be in contravention of the constitution of the United States." This court acquires jurisdiction of the entire case, and of all questions involved in it, and not merely of the constitutional questions. Nishimura Ekiu *vs.* United States, 142 U. S. 651; Horner *vs.* United States, 143 U. S. 570, 577; United States *vs.* Jahn, 155 U. S. 109, 112, 113; Chappell *vs.* United States, 160 U. S. 499, 509.

ARGUMENT.

We do not concede that the assessments complained of in the bills are authorized by the Nichols law, or that the Supreme Court of Ohio would justify them if they were before that court. If not, the demurrers should have been overruled on the ground that the allegations of the bills show the assessments to be illegal, even assuming the statute itself to be a valid law; and this court, having jurisdiction of the entire case, must now overrule the demurrers on that ground, even if the court should be of opinion that the Nichols law itself does not contravene any provisions of the constitution of Ohio or of the United States, because, if the Nichols law, in the view of this court, properly construed, requires the property of express companies, such as it is, to be assessed on the basis of its ordinary value as property, it is manifest that that has not been done, and that the assessments made by the state board, increasing that value ten and twenty fold, can not be sustained, and warrant the interposition of a court of equity.

Judge Cooley (Taxation, 2d ed. 785), in speaking of injunctions against fraudulent assessments, after observing that "an assessment is not fraudulent merely because of being excessive, if the assessors have not acted from improper motive," says, "but if it is purposely made too high through prejudice or a reckless disregard of duty, in opposition to what must be the judgment of all competent persons, or through the adoption of a rule which is designed to operate unequally upon a class, and to violate the constitutional rule of uniformity, the case is a plain one for the equitable remedy by injunction." To the same effect is Cummings *vs.* National Bank, 101 U. S. 153. It is the "gross error" referred to in P. C. C. & St. L. Ry. Co. *vs.* Backus, 154 U. S. 421.

But the circuit court, and the circuit court of appeals

(in the cases for 1893 and 1894) held that the assessments complained of had been made in pursuance of a definite rule or principle of appraisement, recognized and established by the Nichols law, as construed by the Supreme Court of Ohio. Our argument, therefore, is addressed to the question whether that rule is valid, under the federal constitution.

I.

The cases raise a federal question, viz: whether the rule of assessment prescribed by the Ohio statute, and adopted by the state board, for the taxation of express companies, contravenes the federal constitution.

Taking the allegations of the bills in connection with the returns made by the express companies to the state board, and the transcript of the proceedings of the state board upon those returns, it is manifest that what the board did, and what the demurrers to the bills admit that they did, was not to assess the defendants on the basis of the market value of such of their tangible property as was found within the state of Ohio, and on their moneys and credits in the state, but to treat the companies as owning dividend producing plants, whose value is represented by the market value of their shares, and to assign a portion of that value to the state of Ohio, as being property subject to taxation in that state. The basis of the apportionment made by the board to Ohio is not disclosed; it was evidently haphazard and arbitrary; but that is not material now. The point is that the state board deliberately and intentionally followed a certain rule and principle of assessment, being the rule prescribed by the statute of the state, as construed by its supreme court, and the validity of that rule is therefore raised by the record, and presents a fed-

eral question which must be decided in our favor, if we can show that the rule contravenes any of the provisions of the federal constitution. In other words, the question is not one merely of valuation, but of the legality, under the federal constitution, of the rule which the statute of Ohio prescribes for the assessment of express companies. The bills distinctly allege that the rule of the statute does contravene certain provisions of the federal constitution. What the rule of assessment is, whose validity is thus challenged, is disclosed in the following passage from Judge Taft's final opinion dismissing the bills of the Adams Express Company for 1893:

"It is perfectly manifest that what the board of assessors did was not to estimate the tangible personal property of the express company, as it would have been estimated if new, and in the store or factory or on the farm from which it was purchased. The difference between $53,000, the amount in the return, and $460,000, the amount assessed, can not be explained by a failure to return a few traveling safes and pouches or by any possible under-valuation. . . . What the board of assessors really did was to treat, as the total taxable personal property of the company, every element, except real estate, which contributes to earn dividends, including tangible personal property, franchises, good-will, business skill and judgment, and railway contracts and arrangements. The result was reached by subtracting from the total market value of the capital stock the value of the real estate, and then apportioning of the remainder, what it regarded a fair and reasonable part to Ohio." (Exhibit Book 98.)

Judge Taft then asks whether this is really the rule which the Ohio statute, as construed by its supreme court, prescribes, and says:

"I think that it is. An examination of the reported decision in the Jones case satisfies me that, in the opinion of that court, the entire plant of express companies, taken as

a dividend producing unit machine, and including as part of it and as elements of its value, the good-will, business skill with which it is operated, the railway contracts and arrangements, and all other value-giving circumstances, may be treated as personal property subject to taxation, and that the part of that unit which can be fairly considered to be within the taxing jurisdiction of Ohio, arrived at by any reasonable method, is taxable as such in that state. The board of assessors seem to me to have kept well within this construction of the law." (Exhibit Book 99.)

There Judge Taft drops the case, with the observation that no fraud is alleged, but without inquiring whether "the rule of appraisement adopted by the state board," to use his own expression, violates any provision of the federal constitution. That inquiry overlooked by Judge Taft, we address ourselves to in this brief. But before doing so let us point out that the circuit court of appeals, although deciding the federal question against the plaintiffs, did not deny that the federal question arose. They decided it against the plaintiffs because, to use their own language, they were of opinion that "the fact that the property of the express companies was valued as a unit profit-producing plant did not violate any federal restriction upon the taxing power of a state within which a part of that plant is found. The value of property depends in a large degree upon the use to which it is put. If a railroad may be valued as a unit, rather than as a given number of acres of land, plus so many tons of rails, and so many thousand ties, and a certain number of depots, shops, etc., there is no sufficient reason why the property of an express company should not be treated as a unit plant. If the state of Ohio had a right to tax the property within the state, and to assess it at its true cash value, there is no federal restriction which will prevent such property from being assessed at

the value which it has, as used, and by reason of its use," citing Railroad Company *vs.* Backus, 154 U. S. 431; Western Union Telegraph Company *vs.* Massachusetts, 125 U. S. 530; Pullman's Palace Car Company *vs.* Pennsylvania, 141 U. S. 18. (Exhibit Book 113.)

The bills allege that the rule of appraisement prescribed by the Ohio statute contravenes certain provisions of the federal constitution, and we submit that the federal question is involved. The cases can not be disposed of on the ground that they raise merely the question of a difference of opinion between the plaintiffs and the state board as to the value of the plaintiffs' horses and wagons and safes and other appliances.

Whether the federal question thus raised must be decided in the plaintiff's favor presents the next inquiry.

II.

If the Nichols law justifies the assessments complained of, it contravenes the interstate commerce clause of the federal constitution; because the assessments, while purporting to be upon the property of the plaintiffs within the state, are, in fact, levied upon the plaintiffs' business (which is largely interstate commerce), by placing a fictitious and artificial value upon their property.

Under the interstate commerce clause of the federal constitution it is not competent for a state to tax a non-resident person or corporation engaged in interstate commerce, upon their occupation or business. The state's power of taxation, in such cases, is limited to a tax upon such of the property of the person or corporation, as is found within the taxing jurisdiction of the state, and that property must be taxed without discrimination. It is just as much a violation of this rule of the federal constitution to levy a tax

ostensibly on property, but really on business, by ascribing an artificial or fictitious value to the property, as to make the levy directly and in terms upon business. In Crutcher vs. Kentucky, 141 U. S. 47, 58, Mr. Justice Bradley said:

"As a summation of the whole matter, it was aptly said by the present Chief Justice in Lyng vs. Michigan, 135 U. S. 161, 166, 'we have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duty laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.'"

The question then is whether assessments, such as the bills allege were made by the state board, and such as Judge Taft admits the state board were authorized by the Ohio statute to make against these express companies, are really assessments against them in the respect of property held or owned by them in the state of Ohio. If not, they can not be sustained under the federal constitution. Speaking of the assessments, Judge Taft says in his final opinion:

"It is perfectly manifest that what the board of assessors did was not to estimate the tangible personal property of the express company as it would have been estimated if new and in the store or factory, or on the farm from which it was purchased. . . . What the board of assessors really did was to treat as the total taxable personal property of the company every element, except real estate, which contributes to earn dividends, including tangible personal property franchises, good-will, business skill and judgment, and railway contracts and arrangements." (Exhibit Book 98.)

In his original opinion Judge Taft had already said upon the same subject:

"This appraisement was not an appraisement of the

property of the company in Ohio at all. . . . Tax by such a measure of value is an income tax and not a property *ad valorem* tax." (Exhibit Book 68.)

In his final opinion, therefore, Judge Taft seems to have overlooked the infirmity, under the federal constitution, of an appraisement which "was not an appraisement of the property of the company in Ohio at all." He failed to realize that, if such was the character of the appraisement—if it was what he declared it to be, "not a property *ad valorem* tax," but "an income tax," in other words, a tax upon the business of the company, it was clearly illegal, under the federal constitution, independent of any consideration arising under the constitution of the state. It seems to us clear, therefore, that if this appraisement is what Judge Taft describes it to be, it is invalid under the federal constitution.

Judge Lurton in the circuit court of appeals supports the assessments for 1893 and 1894 as assessments against property by saying:

"The tax imposed is not a license tax, nor a tax on the business or occupation, nor on the transportation of property through the state, nor from points within the state to points in other states, nor from points in other states to points within the state. . . . Neither does the fact that the property of the express companies was valued as a unit profit-producing plant violate any federal restriction upon the taxing power of a state within which a part of that plant is found. The value of property depends in a large degree upon the use to which it is put. If a railroad may be valued as a unit, rather than as a given number of acres of land plus so many tons of rails, and so many thousand ties, and a certain number of depots, shops, etc., there is no sufficient reason why the property of an express company should not be treated as a unit plant. If the state of Ohio had a right to tax the property of the companies within the state, and to assess it at its true cash value, there is no fed-

eral restriction which will prevent such property from being assessed at the value which it has, as used, and by reason of its use." (Exhibit Book 113.)

It is true that the value of real estate, or of property, such as a railroad or telegraph, attached to real estate, depends largely upon the use to which it is put, because, being immovable, it can not be used elsewhere or otherwise, and that particular use therefore affects or determines its market value, which, after all, is the ultimate test of the value of everything. But the market value of fugitive personal property, such as horses and wagons, *considered as property*, is not dependent upon the use to which it may be put by a particular owner. The value of a horse or wagon, considered as property, is the same, whether the owner uses it in a business that makes money or in a business that loses money. The bills aver that the plaintiffs have no property in the state except certain horses, wagons, safes and office furniture, and that this property is of the ordinary kind, whose value in money is easily ascertained by ordinary standards, for a horse is a horse, and a wagon is a wagon, whether it belongs to a farmer, or to a drayman, or to an express company. The express companies must pay taxes upon their horses and wagons according to their market value, whether they lose or make money in their business, and whether they make much or little. We can conceive of two express companies, having the same personal property and tangible appliances, one of which makes money, and the other of which makes less money, or none, in carrying on its business. But the property of the two companies, considered as property, must be assessed the same against both. In valuing the property, as property, no discrimination is permitted on account of the success of the business in which it may be used. Judge Lurton's view comes to this: that the horses and wagons of an ex-

press company may be assessed at ten or twenty fold their value, according as they happen to be used in connection with a business that yields profits. But that is not assessing the property, as property. It is assessing the profits of the business, which, as against an express company engaged in interstate commerce, can not be done. The only assessment that can be made against such a company is upon such of its property, considered as property, as is found within the state that levies the tax.

To say that this sort of detached and fugitive property, simply because it is employed in the business of an organized express company, is unit property, like a railroad or telegraph, is only another way of attempting to justify an assessment against the business of a company, under the pretense of assessing its property. A railroad or telegraph may be treated as a unit in law for purposes of taxation, because it is a unit in fact; an actual, tangible, physical unit.

The assessments confessedly include assessments against the express companies on account of their contracts with railroad companies, upon the assumption that they constitute property which may be taxed against the express companies. This is an erroneous assumption. The only *property* involved in such contracts is the railway and cars, and they are taxed against the railway companies, and that, too, upon the basis of the value of the railway, as affected by the earnings derived by them from the express companies. The most that can be claimed by the state is that the express companies' railroad contracts create a sort of leasehold interest in the express companies; but if the railways are assessed at their full value, against the companies that own them, the power of assessing that property is exhausted. You have assessed the whole of it, and subsidiary interests are not capable of further assessment.

The idea that the property of the express companies can be treated as unit property, and assessed otherwise than according to its ordinary value, is inconsistent with the observations of this court in Pacific Express Co. vs. Seibert, 142 U.S. 339, 354, where Mr. Justice Lamar, in justifying an excise tax on the receipts of railroad express companies says:

"Express companies, such as are defined by this act, have no tangible property of any consequence subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts for business transacted."

It is of course only upon receipts from business done wholly within the state that they can be taxed, and such a tax the state of Ohio levies. (Exhibit Book 39.) No other business, except the liquor traffic, has ever been subjected to an excise tax in Ohio.

III.

The rule for the assessment of express companies, prescribed by the Nichols law, discriminates against the property of express, telegraph and telephone companies, on account of its mere ownership, as compared with all other property in the state, and therefore denies to those companies the equal protection of the law, in contravention of the fourteenth amendment of the federal constitution.

The elements which the Nichols law, as construed by Judge Taft, requires to be taken into consideration, in assessing the property of express companies, are not prescribed for the assessment of similar property within the same jurisdiction, put to similar uses when owned by any other persons or corporations, or indeed for the assessment of any other property of any sort within the state of Ohio. Similar and other property, as against all other owners, is assessed under the rule prescribed by Rev. Stat. Ohio, Sec.

2739, to-wit: "at the usual selling price thereof at the time of listing and at the place where the same may then be," and wholly without reference to the profits of the business in which it may be employed, the particular uses to which it may be put, or the good-will or successful management of the owner. The rule prescribed against express, telegraph and telephone companies is, therefore a discriminating rule enforced against those particular agencies of interstate commerce.

I do not deny the power of the legislature to classify property. But power to classify is not arbitrary. It must be classification in fact, and not discrimination. Property can not be classified in respect of mere ownership. The same kind and character of property devoted to the same uses, within the same taxing districts, can not be taxed by one rule against one class of persons and by a different rule against another class. But that is precisely what the Nichols law attempts to do. It attempts to classify property according to its mere ownership, and to prescribe a rule of assessment and taxation against express companies different from that which is applied to the same kind and character of property devoted to the same uses, under similar conditions and circumstances in the same jurisdiction, when owned by persons other than express companies. This is denying to express companies the equal protection of the law.

The classification of railroad and telegraph property as unit property is not a classification according to ownership, but according to intrinsic differences in the character, use and situation of such property, and the difficulty attending the ascertainment of its value otherwise than as a unit. These considerations make the separate classification of such property not merely convenient, but necessary, as well as natural and reasonable. But the property owned

by express companies within the state of Ohio is not different in its character, uses, or situation, from other similar property within the state, nor is there any greater difficulty in ascertaining its value for the purpose of taxation. Express companies do not make any different use of their horses, wagons, safes, office furniture, or such other property as the bills show them to have within the state, than that which is made of the same kind of property by other inhabitants of the state. This value is easily ascertainable, and is susceptible of assessment and taxation in accordance with the laws which apply generally to the taxation of property within the state.

In his original opinion in the telegraph case Judge Taft reviews the provisions of the statutes of Ohio governing the assessment of all other property in the state. He points out that the rule prescribed by the Nichols law against express companies is not enforced against any other owners of property, and concludes with this observation, showing the extent of the discrimination against express companies:

"It is very manifest from this review of the provisions for assessing the taxable value of the tangible property of individuals and corporations in business that neither the profits of the business, nor the good-will, nor those other intangible factors in the earnings of profits, are required to be considered, and it is very certain that they never are considered." (Exhibit Book 65.)

For the convenience of the court we print these statutes in the Exhibit Book. They show that, without exception, property in Ohio, except that covered by the Nichols law, is valued for taxation without reference to the earnings or profits of the business in which it is used, and altogether on the basis of its value as property.

IV.

The Nichols law is in contravention of the fourteenth amendment, for the further reason that it taxes property not within the taxing jurisdiction of the state of Ohio.

It has been held more than once in this court that the power of a state to tax the property of non-residents is limited to such of their property as is found within the state; in other words, that a state can not tax lands lying beyond its borders, nor personal property domiciled in another state. Hays *vs.* Pacific Steamship Co., 17 How. 596, 599; Railroad Co. *vs.* Jackson, 7 Wall. 262, 267, 268; St. Louis *vs.* Ferry Co., 11 Wall. 423, 430, 432; Railroad Co. *vs.* Pennsylvania, 15 Wall. 300; Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S. 196, 206, 210.

The ground upon which this immunity is secured, under the federal constitution, has not been clearly stated in all the cases. The earlier ones arose prior to the adoption of the fourteenth amendment, but we submit, that it is depriving a person of property without due process of law, in contravention of the fourteenth amendment, for a state to tax property not within its jurisdiction.

In the first of the cases cited (Hays *vs.* The Pacific Mail Steamship Co., 17 How. 596, A. D. 1854), the court held that an ocean steamer, owned and registered in New York, and regularly plying between Panama and San Francisco and ports in Oregon, remaining in San Francisco no longer than necessary to land and receive passengers and cargo, and in Benicia only for repairs and supplies, is not subject to taxation by the state of California. Mr. Justice Nelson, delivering the opinion, said:

"We are satisfied that the state of California *had no jurisdiction* over these vessels *for the purpose of taxation;* they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the state." (17 How. 599.)

St. Louis *vs.* Ferry Company, 11 Wall. 423 (1870), was a similar case. The state of Missouri undertook to tax ferry boats belonging to an Illinois corporation, that plied between St. Louis and East St. Louis, and the Supreme court of Missouri had sustained the tax (The City of St. Louis *vs.* Wiggins Ferry Company, 40 Mo. 580). But this court held that Illinois was the home port of the boats; that they "were *beyond the jurisdiction* of the authorities by which the taxes were assessed," and that "the validity of the taxes could not be maintained." (11 Wall. 432.) Mr. Justice Swayne, in the course of the opinion, said:

"Where there is jurisdiction, neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a state should enact that the citizens or property of another state or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, *such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative, as to valid judicial, action.*" (11 Wall. 430.)

In Railroad Company *vs.* Jackson, 7 Wall. 262 (1868), the state of Pennsylvania attempted to tax bonds secured upon a railroad lying partly in that state and partly in Maryland. Mr. Justice Nelson delivering the opinion said:

"Now it is apparent, if the state of Pennsylvania is at liberty to tax these bonds, that, to the extent of this Maryland portion of the road, *she is taxing property and interests beyond her jurisdiction.* . . . Our conclusion on this branch of the case is, that to prevent the deduction of the tax from the coupons in question, would be giving effect to the acts of the legislature of Pennsylvania *upon property and interests lying beyond her jurisdiction.*" (7 Wall. 267, 268.)

In Railroad Company *vs.* Pennsylvania (case of the state tax on foreign held bonds) 15 Wall. 300 (1872), which was

a writ of error to the Supreme Court of Pennsylvania, it was held that an act of the state of Pennsylvania, undertaking to tax railroad bonds held by non-residents of the state, citizens of other states, was not "a valid and constitutional exercise of the taxing power of the state," but "an interference, under the name of a tax, with the obligation of the contracts between the non-resident bondholders and the corporation." Mr. Justice Field thus states the conclusion of the court:

"We are clear that the tax can not be sustained; that the bonds, being held by non-residents of the state, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the state." (15 Wall. 325.

In Gloucester Ferry Company *vs.* Pennsylvania, 114 U. S. 196, the state of Pennsylvania laid a tax of $2,593.96 on the appraised value of the capital stock of the Ferry Company, a corporation of New Jersey, which owned no property in Pennsylvania except the lease of a slip or dock, where its ferryboats put up in plying across the river, between the two states. This court upset the tax as an unlawful burden on interstate commerce, holding that its wharf lease was the only property of the Ferry Company that was subject to taxation in Pennsylvania.

It is immaterial upon what ground, as the result of these cases, we rest the doctrine that the states have no jurisdiction to tax real estate lying beyond their borders, or personal property domiciled in another state. The doctrine itself must be accepted as thoroughly established.

But the Nichols law, as construed below, not only attempts to tax, as property, that which is not property at all, such as good-will, reputation, and business capacity, but to tax property that is not situated or domiciled in Ohio; for the bills

allege that among the assets of the plaintiffs, which enter largely into the value of their capital shares, is real and personal property of great value, aside from the appliances of their express business, which is not held or taxable in the state of Ohio, and some of which, such as government bonds, is not taxable at all. In the case of two of the companies the allegation is that they hold, outside of Ohio, stocks and bonds worth millions of dollars. These, of course, enter into the taxable values which the Nichols law, as construed by Judge Taft and by the circuit court of appeals, undertakes to assess, although they are not subject to the taxing jurisdiction of the state of Ohio.

V.

There is no necessary or proper relation between the value of the PROPERTY of an express company and the value of its capital shares.

Prior to the passage of the Nichols law the property of express companies was valued, in common with the property of corporations and joint-stock companies generally, on the basis of its market price. Rev. Stat. Secs. 2739, 2744. (Exhibit Book 18.) The object of the Nichols law was to change this method of valuation, so far as express, telegraph and telephone companies are concerned, and to assess them on the basis of "the value of their capital stock;" in other words, to substitute an assessment of their capital stock, for an assessment of their tangible property, and moneys and credits, within the state, and to apportion to Ohio such proportion of the value of the entire capital stock, as the property of the companies in Ohio "bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid." (Sec. 2778 a.)

It is to be noticed, in the first place, that this section indicates the clear purpose of the legislature to add some-

hing to the cash value of specific property, for the direction is, that after the value of the specific property in the state is determined, this sum shall be "in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid;" whereas, we insist that it is not competent for the state of Ohio to add anything to the value of the property of the companies in the state, or, when that value is ascertained, to increase it by anything.

But the fundamental error of the statute is in resorting to the value of the shares of express companies for the purpose of estimating personal property of the ordinary kind, such as horses, wagons, harness and safes, that have a market value of their own, well established and easily ascertained. Upon this subject Judge Taft, in his original opinion, after a careful review, said:

"It seems clear, for the reasons stated, that the market value of the shares of capital stock in the complainant and other like companies bears no necessary relation or proportion to the value of the tangible property in Ohio or elsewhere; that the market value of the shares depends on elements of value not taxable in Ohio, and not used to determine the value of the taxable property of individuals or other corporations. If so, it seems necessarily to follow that it is prescribing an unconstitutional rule for the valuation of the property of telegraph, telephone, and express companies to enjoin upon the appraisers of their property, as the Nichols law does, to consider, as an important element, increasing the valuation of their property, the value of the aggregate shares of the capital stock of those companies. (Exhibit Book 67.)

This is especially true of an express company, for its business is largely one of personal service, and its income is derived from such service, and not from the investment or use of property. It is literally true, as said by Mr. Jus-

tice Lamar, in Pacific Express Co. *vs.* Seibert, that "express companies have no tangible property of any consequence subject to taxation under the general laws," and that "there is no way by which they can be taxed at all unless by a tax upon their receipts from business transacted."

The plaintiffs have no property in the state of Ohio, as the bills aver, except certain horses, wagons, harness, safes and office furniture, which is of the ordinary kind, whose true value in money is easily ascertained by ordinary standards. It is neither necessary nor proper, in ascertaining the value of this property, to consider the par or market value of the companies' capital stock. The value of the capital stock of an express company depends upon its earnings, and they in turn depend upon the success with which it conducts its business, its reputation, the ability and integrity of its employes, and the efficiency of its organization. The profits of a year may be swept away by the theft of a dishonest agent. They may be increased many fold by the ability and integrity of the company's agents, and by the skill with which the managers make contracts and conduct the business generally. But none of these circumstances, affecting the earnings of the company, and therefore the value of its capital stock, have any proper bearing upon the value of its chattel property, which, together with the moneys and credits of the company within the state, is alone subject to taxation there. The company must pay taxes upon its horses and wagons, according to their market value, whether it loses or makes money in its business, and whether it makes much or little. The plaintiffs are joint-stock associations or copartnerships enjoying no franchise from the state of Ohio. Their business in the state is largely interstate commerce. They are entitled to do that business without let or hindrance by the state, and can not be taxed for the privilege of doing it.

They can be taxed only upon their property in the state, and are entitled to have that property assessed according to its value, and not upon the basis of the value of something else.

In some corporations, where dividends result largely from the use and investment of property, the value of the corporate shares may afford a just criterion of the value of the property of the corporation. But that is not true of railroad express companies. They use comparatively little property of their own in carrying on their business. It is done principally upon railroads that belong to, and are taxed as the property of, others.

But even in the case of an ordinary corporation it is not permissible to estimate the value of the property of the corporation on the basis of the value of the corporate shares. The error of such an estimate is pointed out with great force in People *vs.* Coleman, 126 N. Y. 433. Speaking of the action of the assessors in that case, the court said:

"In other words, knowing with certainty the value of one thing, they claimed the right to affix to it the larger value of a different thing. Authorized only to tax against the company its capital and surplus, they assumed the right, practically, to tax it for the share stock held by individuals. They have not in terms claimed that the share stock is the subject of taxation, nor has the counsel who represented them on the argument, but both have maintained and defended what is the exact and complete equivalent. The right asserted is a discretion in the assessors, at their free will, to assess corporations upon, and at the value of, the share stock, independently of established facts, and whenever they please. The law gives them no such discretion. How it has been exercised, and how destructively to the rights of tax-payers, may be seen by comparing the action in this case with that in one of the cases which we have reviewed. Where the share stock was selling at 90,

and so below par, the assessors refused to take that value, and went to the company's books in search of a larger one, which they found and adopted. Here, where the actual value of capital and surplus is established so that they frankly admit the fact, they calmly disregard it, and fly to the larger value of the share stock. The statute has given them no such right. They are not lawless rovers, wandering among corporations at will, but regular officers, bound by discipline and controlled by the law, and whose discretion exists within fixed and definite limits."

VI.

If the rule of assessment, applied by the state board against the plaintiffs, contravenes the federal constitution, it is immaterial whether that rule is prescribed by the statute, or whether it is adopted, independent of the statute, by the board itself.

We have assumed thus far that the rule of assessment followed by the state board is the rule prescribed by the Nichols law, as construed by the Supreme Court of Ohio. Such was the view of Judge Taft, and such is the claim of the attorney-general. But if we agree that the Supreme Court of Ohio did not mean to sanction the adoption of such a rule, and that it is a rule of assessment which the state board have arbitrarily set up for themselves, the plaintiffs are nevertheless entitled to relief.

In Yick Wo *vs.* Hopkins, 118 U. S. 356, this court had to consider a laundry ordinance, innocent enough on its face, but which was enforced by the municipal authorities so as to discriminate unlawfully. Upon this point Mr. Justice Matthews said (p. 373):

"The cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their adminis-

tration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned by this court in Henderson *vs.* Mayor of New York, 92 U. S. 259; Chy Lung *vs.* Freeman, 92 U. S. 275; Ex parte Virginia, 100 U. S. 339; Neal *vs.* Delaware, 103 U. S. 370, and Soon Hing *vs.* Crowley, 113 U. S. 703."

In Cummings *vs.* National Bank, 101 U. S. 153, a tax assessment against national banks was upset, not because the statute which imposed it violated any principle of the federal constitution, but because the officers charged with the administration of the statute had adopted a method of unequal valuation.

It was with respect to this case that Judge Taft said:

"Certain it is that courts will not permit injustice to be done to a class of tax-payers by a law which is so worded as to mean one thing to the courts when its validity is attacked and another thing to the taxing officers when they come to enforce it. Either the law means what the officers construe it to mean, and its validity is to be tested on that construction, or they are to be enjoined from enforcing it except as the courts shall construe it." (Exhibit Book 69.)

In this connection we call attention to the recent utterance of the Supreme Court of Ohio, concerning the Nichols law, in the case of The Adams Express Company *vs.* State of Ohio, decided June 23, 1896 (35 Cincinnati Weekly Law Bulletin, 393), being a suit to test the constitutionality

of the express excise tax law. Burket, *J.*, delivering the opinion, says:

"What is known as the Nichols law, held constitutional in State ex rel *v.* Jones, 51 Ohio St. 492, imposes a tax upon property only, and does not impose any tax for the privilege of exercising a franchise in this state. Before the passage of the Nichols law, express companies were taxed on their property within this state under section 2744 Revised Statutes, the same as other corporations, and they paid a tax under section 2778, for the privilege of doing business in this state. The Nichols law prescribed new rules for ascertaining and valuing the property of express companies, so as to largely increase the valuation of their property for the purposes of taxation, and repealed the tax for the privilege of doing business in this state. The statute in question [express company excise tax law, Exhibit Book 39], again enacted a tax for the privilege of doing business in the state, and named it an 'excise tax.'"

VII.

The Remedy by Injunction.

The statutes of Ohio (Rev. Stat., Sec. 5848) expressly declare that suits may be brought "to enjoin the illegal levy of taxes and assessments;" which means an injunction prior to the entry of the assessment upon the tax duplicate. Jones *vs.* Davis, 35 Ohio St. 474. The remedy will be enforced by the federal courts, on the equity side, as was expressly decided, in respect of this very statute, in Cummings *vs.* National Bank, 101 U. S. 153, 157. It is the policy of the state of Ohio to require resort to this remedy by injunction, rather than to permit suits to recover illegal taxes back after payment. Whitbeck *vs.* Minch, 48 Ohio St. 210, where the court say:

"In such case the general rule applies that, if litigation is intended, it must precede payment where, as in such cases, the party has a plain remedy provided by statute,

section 5848, Revised Statutes, and may resort to the same, and thereby avoid a distress of his property."

The following are the sections:

Sec. 5848. Courts of common pleas and superior courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof; but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected.

Sec. 5849. Actions to enjoin the illegal levy of taxes and assessments must be brought against the corporation or person for whose use and benefit the levy is made; and if the levy would go upon the county duplicate, the county auditor must be joined in the action.

Sec. 5850. Actions to enjoin the collection of taxes and assessments must be brought against the officer whose duty it is to collect the same; actions to recover back taxes and assessments must be brought against the officer who made the collection, or, if he is dead, against his personal representative; and when they were not collected on the county duplicate, the corporation which made the levy must be joined in the action.

Section 5849 prescribes the ordinary rule of parties, but the impracticability of bringing in the "corporations or persons for whose use and benefit" the levies at bar are to be made, should not interfere with the exercise by this court of the equitable remedy provided by section 5848. All the necessary parties are before the court.

But, independent of the statute, the plaintiffs have a clear right to resort to a court of equity to prevent a multiplicity of suits. Cummings *vs.* National Bank, 101 U. S. 153, 157; Shelton *vs.* Platt, 139 U. S. 591, 594; Pacific Express Company *vs.* Seibert, 142 U. S. 339, 348; Marshall *vs.* Holmes, 141 U. S. 589; 2 Daniell's Chancery Practice (5th ed.), 1661 n. (3), and cases cited.

We are also entitled to an injunction upon the further

principle recognized in Cummings *vs.* National Bank, which was a suit, coming up from Ohio, to enjoin the assessment of shares of stock in a national bank. The court, after considering the Ohio statute permitting injunctions against illegal taxes, said:

"Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power. That is precisely the case made by this bill, and if supported by the testimony, relief ought to be given." (101 U. S. 157, 158.)

We respectfully submit that the decrees of the circuit court should be reversed, and the cases remanded, with directions to overrule the demurrers to the bills.

LAWRENCE MAXWELL, JR.

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Counsel for the Adams Express Company.

JAMES C. CARTER,
Counsel for the American Express Company.

FRANK H. PLATT,
Counsel for the United States Express Company.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

165-194

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

APPEALS FROM U. S. CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

1893 CASES.

No. 337.

ADAMS EXPRESS COMPANY, *vs.* STATE BOARD.

No. 352.

WESTERN UNION TELEGRAPH COMPANY, *vs.* SAME.

1894 CASES.

No. 338.

PRESIDENT, ADAMS EXPRESS COMPANY, *vs.* POE, Auditor.

No. 339.

PRESIDENT, AMERICAN EXPRESS COMPANY, *vs.* SAME.

No. 340.

PRESIDENT, UNITED STATES EXPRESS COMPANY, *vs.* SAME.

No. 405.

WESTERN UNION TELEGRAPH COMPANY, *vs.* SAME.

APPEALS FROM U. S. CIRCUIT COURT, SOUTHERN DISTRICT OF OHIO.

1895 CASES.

No. 398.

VICE-PRESIDENT, ADAMS EXPRESS COMPANY, *vs.* POE, Auditor.

No. 399.

PRESIDENT, AMERICAN EXPRESS COMPANY, *vs.* SAME.

No. 400.

PRESIDENT, UNITED STATES EXPRESS COMPANY, *vs.* SAME.

No. 401.

WESTERN UNION TELEGRAPH COMPANY, *vs.* SAME.

Brief of John K. Richards For Appellees.

COLUMBUS,
JOURNAL-GAZETTE PRINTING HOUSE.
1896.

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No. 400.

PRESIDENT, UNITED STATES EXPRESS COMPANY, *vs.* SAME.

No. 401.

WESTERN UNION TELEGRAPH COMPANY, *vs.* SAME.

Brief of John K. Richards for Appellees.

STATEMENT.

These cases come here by way of appeal, the 1893 and 1894 cases from the United States Circuit Court of Appeals, Sixth Circuit, and the 1895 cases from the United States Circuit Court for the Southern District of Ohio.

The question involved is the constitutionality of what is known in Ohio as the Nichols law, enacted in 1893 and amended in 1894, and the validity of the assessments of the property of the appellant companies under it.

The Nichols law, as enacted in 1893, provided that telegraph, telephone and express companies should make return of certain facts to the Auditor of State. These returns were laid by the Auditor of State before the State Board of Appraisers and Assessors, consisting of the Auditor of State, Treasurer of State and the Attorney General, whose duty it was to assess the value of the property of these companies in Ohio as a unit, taking the value of the capital stock as a guide. This valuation was apportioned by the State Board among the various counties and certified to the County Auditors to be placed upon the local duplicates.

The amended law, passed in 1894, provided that the State Board should certify its valuation to the Auditor of State, who was charged with the duty of apportioning the valuation among the counties and certifying the same to the County Auditors.

The original suits were brought in the Circuit Court for the Southern District of Ohio, to enjoin the certification of the apportioned valuations to the County Auditors. The 1893 suits were brought against the State Board, the 1894 and 1895 suits against the Auditor of State.

The cases for 1893 were filed in November 1893, by the Western Union Telegraph Company and the Adams, American, United States and National Express Companies. They were first argued before the Circuit Court in December of that year, upon applications for preliminary injunctions and upon demurrers to the bills.

On March 14, 1894, Judge TAFT filed his opinion (*exhibit book*, page 42), dismissing the cases of the American, United States and National Express Companies for want of jurisdiction, and retaining the other cases for further argument upon certain points suggested by him. In this opinion (*exhibit book*, bottom page 47, top page 48), he indicated his opinion on the Federal questions argued before him as follows:

> "I do not care to hear counsel again on the question, whether the creation of a tribunal to assess the property of telegraph or express companies, different from that charged with the duty of assessing the property of individuals, is a departure from the uniformity enjoined by the State constitution, I am satisfied that it is not. Nor, do I care to hear counsel on the question, whether the companies are denied by this law, a right to be heard, so that there is a taking of property without due process of law in violation of the Federal constitution, for I think they have ample opportunity to be heard by written statement and oral argument if necessary. Nor, do I think there is any weight to be given to the objection, that by classification of companies under this law, there is any denial to the complainants of the equal protection of the laws within the inhibition of the 14th amendment to the Federal constitution, if such classification is permitted by the State constitution."

"He then goes on to suggest certain questions which he desired reargued. A reargument was had, and on April 23, 1894, Judge TAFT filed his opinions (*exhibit book*, page 49, page 80), in which he held the Nichols law unconstitutional, because it violated that provision of the constitution of Ohio, which requires all property to be taxed by a uniform rule, and according to its true value in money. In so holding, he took occasion to say (*exhibit book*, bottom page 77, top page 78):

> "I have reached the conclusion that this law is unconstitutional with great reluctance. * * *
> It is exceedingly embarrassing for a Federal court to pass upon the validity of a state law, under a state constitution in advance of the Supreme Court of the State, which is the ultimate tribunal on all such questions. *Pelton* vs. *Bank*, 101 U. S., 143, 144. * *
> I ought to add that if the case could have been made to turn on a question under the Federal constitution, I should have passed the State question without deciding it; but this was impossible."

Meantime, March 19, 1894, Jones, Auditor of Lucas county, having refused to put upon the duplicate the apportioned valuation of the property of the National Express Company certified to him, on the ground that the Nichols law was unconstitutional, a suit in mandamus was brought against him in the Supreme Court of Ohio. This case was argued on April 12, 1894 and decided May 1, 1894, the Supreme Court of Ohio holding, after full argument and consideration, that the Nichols law is a valid and constitutional enactment. The opinion in this case is printed in *exhibit book*, page 122.

On May 26, 1894, this Court decided what are known as the Indiana Railroad cases (154 U. S., 421, 439), holding that the Indiana law providing for the valuation of railroad property by a state board, which has power to consider the value of the capital stock of a railroad company in assessing its property, is constitutional.

After these decisions, Judge TAFT, on November 8, 1894, reversed his first ruling, and followed the decision of the Supreme Court of Ohio, holding that the Nichols law does not violate the constitution of Ohio (*exhibit book*, page 88). Subsequently, on April 8, 1895, he filed a further opinion (*exhibit book*, page 95) holding that the assessments were valid; that the State Board, in its action, had kept well

within the construction given the law by the Supreme Court of Ohio.

In all these cases the final decree of the Circuit Court dissolved the temporary injunctions, sustained the demurrers and dismissed the bills.

The 1893 and 1894 cases were appealed to the United States Circuit Court of Appeals, and the decrees of the Circuit Court sustained.

From this action of the United States Circuit Court of Appeals, which was final under the law, an attempt is made to appeal to this Court.

The cases for 1895 were appealed directly from the Circuit Court to this Court.

THE NICHOLS LAW OF 1893.

Under the law of Ohio as it existed prior to the passage of the Nichols law in 1893, telegraph and express companies were required to make return to the county auditors of their tangible property; at the same time they were required to return their gross receipts from business done within the state. Both property and gross receipts were treated as personal property, placed upon the local duplicate, and taxed as other personal property. Telephone companies were required to make local return of their property like other corporations.

The Nichols law repealed these provisions and created a State Board, consisting of the Auditor of State, Treasurer of State and Attorney General, constituting a State Board of Appraisers and Assessors, which was charged with the duty of assessing the property in Ohio of telegraph, telephone and express companies. Between the first and tenth days of May,

each telegraph, telephone and express company, doing business in Ohio, was required to file a return with the Auditor of State, setting forth among other things, the amount of its capital stock; the par value and market value (or, if there be no market value, then the actual value) of its shares at the date of the return; a statement in detail of the entire real and personal property of said companies and where located, and the value thereof as assessed for taxation. Telegraph and telephone companies were required to return, also, the whole length of their lines, and the length of so much of their lines as is without and is within the State of Ohio, including the lines controlled and used, under lease or otherwise. Express Companies were required to include in the return a statement of their entire gross receipts for the year ending the first day of May, of the business done in the State of Ohio, giving the receipts of each office in the state and the location thereof. Provision was made in the law for the organization of the Board, for the appointing of one of its members as secretary and the keeping of full minutes of its proceedings. The Board was required to meet in the month of May and assess the value of the property of these companies in Ohio. The rule to be followed by the Board in making the assessment is thus stated (*exhibit book*, page 3):

> "Said Board of Appraisers and Assessors shall, in determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said Board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said corporations, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

In the case of telegraph and telephone companies, the Board was required to apportion the valuation among the several counties through which the lines run, in the proportion that the length of the lines in the respective counties bear to the entire length in the State. In the case of express companies, the apportionment to is be made among the several counties in which they do business, in the proportion that the gross receipts in each county bear to the gross receipts in the State.

The amount thus apportioned was to be certified to the County Auditor, and placed by him on the duplicate "to be assessed, and the taxes thereon collected the same as taxes assessed and collected on other personal property," the rate of taxation to be the same as that on other property in the local taxing district.

There was the further provision that the valuation of all the real estate of the companies, situated in Ohio, should be deducted from the total valuation, as fixed by the Board.

THE NICHOLS LAW OF 1894.

The amendment of 1894 simplified and put in logical shape the original act, but made no material changes. The same rule for the direction of the State Board in making its assessment was retained, (see *exhibit book*, page 8). More explicit provisions were made for the hearings and for the correction of erroneous and excessive valuations, as follows:

> "At any time after the meeting of the board on the first Monday in June, and before the assessment of the property of any company is determined, any company or person interested shall have the right, on written application, to appear before the board and be heard in the matter of the valuation of the property of any company for taxation. After the assessment of the property of

any company for taxation by the board, and before the certification by the auditor of state of the apportioned valuation to the several counties, as provided in section 2780, the board may, on the application of any interested person or company or on its own motion, correct the assessment or valuation of the property of any company, in such manner as will, in its judgment, make the valuation thereof just and equal. The provisions of Section 167 of the Revised Statutes shall apply to the correction of any error or over-valuation in the assessment of property for taxation, by the state board of appraisers and assessors, and to the remission of taxes and penalties illegally assessed thereon."

Section 167 of the Revised Statutes, referred to, is as follows:

"Section 167. He (the auditor of state) may remit such taxes and penalties thereon as he ascertains to have been illegally assessed, and such penalties as have accrued or may accrue in consequence of the negligence or error of any officer required to do any duty relating to the assessment of property for taxation, or the levy or collection of taxes, and he may, from time to time, correct any error in any assessment of property for taxation, or in the duplicate of taxes in any county; provided that when the amount to be remitted in any one case shall exceed one hundred dollars, he shall proceed to the office of the governor and take to his assistance the governor and attorney-general, and in all such cases may remit no more than shall be agreed upon by a majority of the officers named."

Instead of distributing the valuation, the State Board now certifies it to the Auditor of State, whose duty it is to apportion and certify the valuation among the counties.

THE ACTION OF THE STATE BOARD.

Not only the constitutionality of the law, but the validity of the assessments made under it is impugned. The provisions of the law appear in the law itself, as originally enacted and as amended, printed in the exhibit book. The action of the State Board in assessing the property of these companies in Ohio is shown in the transcript of the proceedings of the Board and in the affidavit of the Auditor of State, the President of the Board, which, by a stipulation of counsel, were treated as part of the record the same as if made exhibits to the bill. Thus, in the record of Case No. 337, page 57, it is provided in the final decree in the Circuit Court, that "the affidavits of the defendant, Poe, one dated February 26, 1894, and the other, December 20, 1893, shall be treated as if incorporated in the bill by amendment." In the record in Case No. 352, page 22, it is provided in the final decree that "the affidavit of the defendant, Poe, filed December 20, 1893, and the proceedings of the Board thereto attached, shall be treated as if incorporated in the bill by amendment." These are the 1893 cases.

In the 1894 cases (see record in No. 338, page 35), it is provided in the final decree that the proceedings of the State Board shall be treated as if incorporated in each of the bills.

In the 1895 cases, it is provided in the final decree, that the proceedings of the State Board of Appraisers and Assessors, and also the correspondence between the parties, as disclosed by the copies on file, shall be treated as part of the record the same as if made exhibits to the bills (see record in Case No. 398, page 68; record in Case No. 399, page 22; record in Case No. 400, page 29).

THE ASSESSMENT FOR 1893.

TELEGRAPH COMPANY.

The action of the Board in assessing the property of the Western Union Telegraph Company is set forth on pages 31 and 32, record in Case No. 337. The Court will observe that the State Board made a preliminary finding of facts, estimating first the value of the entire capital stock ($81,780,713.40), then deducting the value of the bonds and stocks of other corporations ($7,633,230.12), and of the real estate outside of Ohio ($5,013,326.64), and leaving $69,134,156.64 as the value of the capital stock based upon and represented by the lines of the Company. A proportion of this, taken on the mileage basis, there being 8,272 miles in Ohio, and the entire length of the lines being 189,576 miles, gave $3,016,614.67 as the proportion of the capital stock representing capital and property employed in Ohio.

The Board then proceeded to make the assessment as follows:

> "On consideration of the foregoing, the fact that property generally in Ohio is taxed at not more than two-thirds of its actual value, the statement in the return of the Company, that to reproduce the lines in this State will cost the sum of $1,649,279.10 (which the Board regards as an insufficient estimate, and at any rate much below the existing value of said lines as an entirety) and other facts and evidence contained in the return of the Company and otherwise brought to the attention of the Board, on motion, the Board unanimously fix and determine the value of the property of the Western Union Telegraph Company in the State of Ohio to be assessed and taxed therein, at the sum of $2,011,076.45."

This sets forth the exercise of the judgment of the Board in fixing the valuation of the property of the Company.

While, as a finding of fact, there is a computation of a proportion of the capital stock, the Board used the result of such computation as a guide only because satisfied from all the facts brought before it, that the property of the Company in Ohio was of the value reached by the Board.

EXPRESS COMPANIES.

The action of the Board in assessing the property of Express Companies is set forth on page 33, *Record* in case No. 337, as follows:

> "The Board after considering the facts, set out in the several returns and supplementary statements, written and oral, of the said Express Companies, and their authorized agents, who appeared before the Board, the fact that property in Ohio is ordinarily taxed at not more than two-thirds of its actual value, and other facts and evidence duly brought to the knowledge and information of the board, which, in the opinion of the board, throw light upon the character and value of the property of said Express Companies, and are calculated to aid the board in arriving at the true value in money of the property of said express companies within this State, on motion, the Board unanimously fix and determine the value of the property of said several express companies in the State of Ohio, to be taxed therein, as follows:"

(Then follows the assessed value of the property of the different express companies):

The affidavit of the Auditor of State describing more fully the character of the returns of the company, and the action of the Board is to be found in the same record, pages 34 to 36. After describing the returns and hearings, the affidavit proceeds:

> "In arriving at the value of the property of these express companies taxable in Ohio, the Board did not follow any fixed rule, except the rule that property in Ohio

refused to give certain items of information requested by the Board, and insisted on further hearings, as appears from the minutes. Therefore, when the valuations were reached, they were immediately reported to the Auditor of State, and by him apportioned and certified out. The 1894 suits were brought on September 5, and the restraining orders were not served until after the valuations had been certified out by the Auditor of State. It is now claimed, that the suits were filed on September 4. If so, they were filed before the assessments were made and at a time when no suits would lie against the Auditor of State; they were filed at a time when these companies, by their attorneys, were being heard by the Board.

In point of fact, no jurisdiction over the Auditor of State was ever acquired in the 1894 suits, and these suits must be sustained, if at all, upon the right to join the County Auditors in one action, in order to restrain them from putting the apportioned valuations on the duplicates.

Through some mistake, the proceedings of the State Board in 1894 have been omitted from the record in case No. 338. Accordingly, the transcript of the proceedings, which was before the lower courts and by stipulation incorporated into the bills (See Record No. 338, page 35) is printed as an appendix to this brief.

ASSESSMENTS FOR 1895.

The proceedings of the State Board in making the assessments for 1895 are to be found on pages 61, 62 and 63, record in Case No. 398 (marked No. 842). The final action of the Board as to telegraph companies is to be found, bottom page 61, as follows:

> "The Board having given each telegraph and telephone company doing business in Ohio, whose property in Ohio is hereinafter assessed, opportunity to appear

and to be heard personally by the Board, and having heard all companies which desired to be heard through their officers, agents, or counsel, and having considered the facts set out in the returns, schedules, and supplementary statements of such companies, and all evidences of value and all matters bearing upon the question of the value of the property of the companies which, in the judgment of the Board, would assist it in arriving at the true value in money of the entire property of each of said companies within the State of Ohio, on motion, the State Board of Appraisers and Assessors unanimously fix and determine the value of the property of telegraph and telephone companies hereinafter named in Ohio to be taxed therein at the amounts set out in the following table."

(Then follows the assessed value of the property of the different companies, the property of the Western Union Telegraph Company being assessed at $2,108,845.00.)

The following is the action of the Board relative to express companies (bottom page 62):

"The Board having given each express company doing business in Ohio, whose property in Ohio is hereinafter assessed, opportunity to appear and be heard personally by the Board, and having heard all companies which desired to be heard through their officers, agents, or counsel, and having carefully considered the facts set out in the returns, schedules, and supplementary statements of such companies and all evidences of value and all matters bearing upon the question of the value of the property of the companies which, in the judgment of the Board, would assist it in arriving at the true value in money of the entire property of each of said companies within the State of Ohio, on motion, the State Board of Appraisers and Assessors unanimously fix and determine the values of the property of express companies hereinafter named in Ohio to be taxed therein at the amounts set out in the following table:

"The Adams Express Company, . .	$533,095.80
The American Express Company, .	499,373.60
The United States Express Company, .	488,264.70"

The valuation of the property of the Western Union Telegraph Company was made on June 26, and of the express companies on July 24. On August 2, counsel for these companies wrote the Auditor requesting to be advised of the assessments when made, in order that they might apply for a correction. On August 7, the Secretary of the Board wrote counsel, advising them of the assessments made (see record, page 64). Directly after receiving this notification, on August 10, counsel for the companies fighting the law wrote the letter referred to on page 7 of the brief in cases 398, 399 and 400, asking to know "upon what calculation, if any, the apparently precise amounts of the assessments, especially in the case of the express companies, are based and how the figures are arrived at." This was an attempt to inquire into the mental processes of the members of the Board, not permissible (154 U. S., bottom page 441).

The Board properly answered (bottom page 65), that "the method pursued by the State Board of Appraisers and Assessors this year in assessing the property in Ohio of the Western Union Telegraph Company and the express companies you represent is not different from that followed in former years, which has been sustained by the courts and is set forth in the records of the Board." And the attention of counsel was called to the fact that the companies fighting the law had refused right along to make return of certain important facts called for by law. Counsel was also advised that a hearing for the correction of the assessments would be given the companies on September 2, 1895, but long before this time, namely, on August 13, 1895, the suits were filed.

ARGUMENT.

I.

Where the constitutionality of a law is involved, every possible presumption is in favor of its validity, and this continues until the contrary is shown beyond a reasonable doubt.

The presumption is always in favor of the validity of the law; and it is only when manifest assumption of authority and clear incompatibility between the constitution and the law appear, that the judicial power can refuse to execute it. Such interference can never be permitted in a doubtful case. (*R. R.* vs. *Clinton Co.*, 1 O. S., 82, 83.) In a merely doubtful case, the doubt should turn the scale in favor of the validity of the enactment. The well settled rule is, that it is only in cases where a legislative act is clearly unwarranted by and is repugnant to the constitution, that it will be so declared. (*State* vs. *Cincinnati*, 20 O. S., 33.) If the law is shown to be clearly, palpably in conflict with the constitution, so there is no doubt or hesitancy in the mind of the Court, it should be so held (invalid). But if there be any doubt upon the subject, that should be solved in favor of the law, and the Court should decline to interfere. (*Marmet* vs. *State*, 45 O. S., 64.) It is the duty of courts to construe statutes liberally to save them from constitutional infirmities. (25 O. S., 274.)

The power to raise revenue is included in the general grant of legislative power. Says Judge GHOLSTON, 11 O. S. 542: "The first section of the second article of the constitution declares that the legislative power of this State shall be vested in the general assembly, which shall consist of a senate and a house of representatives. It will be observed that the provision is not that the legislative power, *as con-*

ferred in the constitution, shall be vested in the general assembly, but that THE LEGISLATIVE POWER OF THIS STATE shall be vested. That includes all legislative power which the object and purposes of the state government may require, and we must look to other provisions of the constitution to see how far and to what extent legislative discretion is qualified or restricted."

"The true rule for ascertaining the powers of the legislature is to assume its power under the general grant ample for any enactment within the scope of legislation, unless restrained by the terms or reason of an expressed inhibition." McILVAINE, J., *Ohio ex rel.* vs. *Covington*, 29 O. S., 113; quoted with approval by Judge MINSHALL, in *State ex rel.* vs. *Smith*, 44 O. S., 372.

> "The people in framing the constitution," says DENIO, C. J., (quoted in Cooley's Constitutional Limitations, p. 107), "committed to the legislature the whole law-making power of the state, which they did not expressly or impliedly withhold. Plenary power in the legislature for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception."

"It has never been questioned, so far as I know, says REDFIELD, C. J., "that the American legislators have the same unlimited power in regard to legislation which resides in the British parliament, except where they are restrained by written constitutions." (Cooley's Con. Lim., p. 108.)

See Justice HARLAN in *Powell* vs. *Penna.*, 127 U. S., 678, 684.

The same presumption in favor of the validity of the law, as laid down in the Ohio decisions cited, obtains in this Court. "Every possible presumption" Mr. Chief Justice WAITE said, speaking for the Court in the *Sinking Fund Cases*, 99 U. S., 700, 718, "is in favor of the validity of a

statute, and this continues until the contrary is shown beyond a reasonable doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Speaking of the reluctance of the Supreme Court of the United States to pass on the question whether a statute violates a State Constitution, Mr. Justice MILLER, *Pelton* vs. *National Bank*, 101 U. S., 143, 144, says:

> "It is an appropriate duty, which this Court is called upon to perform very often, to protect rights founded on the constitution, laws and treaties of the United States, when those rights are invaded by State authority. But it is a very different thing for this Court to declare that an act of a State legislature, passed with the usual forms necessary to its validity, is void because that legislature has violated the Constitution of the State."
>
> "It has long been recognized in this Court that the highest court of the State is the one to which such a question properly belongs; and though the courts of the United States, when exercising a concurrent jurisdiction, must decide it for themselves, if it has not previously been considered by the State court, it would be indelicate to make such a decision in advance of the State courts, unless the case imperatively demanded it."

II.

The Nichols law is based upon the essential difference existing between the property of telegraph, telephone and express companies, and other property. The property of these companies is in nature and use a unit, and to be justly valued, so that the companies may bear their fair share of the public burdens, must be treated for assessment purposes as a unit.

The Nichols law is based upon and grows out of the essential difference existing between the property of telegraph, telephone and express companies and other property. A

telegraph or telephone company owns not simply detached and segregated poles, wires, cross-arms or brackets, insulators and instruments, separate and distinct, but poles, wires, brackets, insulators and instruments connected together, used together, and constituting a telegraphic plant or machine for the communication of information and the transmission of intelligence. The value of such a plant depends upon its extent, upon the territory it covers, upon the use of each part in connection with every other part. Cut off the part of the Western Union telegraph existing in any one county of this state from the rest of the system, break the wires and put a stop to the communication, the value of the part of the plant thus cut off would be practically destroyed. You would have the same poles, wires, brackets, insulators and instruments in the county you had before, but it would no longer be part of the great machine, and its value as a portion of the telegraphic plant would be destroyed. The same is true of a telephone company. The value of a telephone plant depends largely upon the terrritory it covers and the opportunity it affords for the easy transmission of intelligence among many persons and neighborhoods.

The poles of telegraph and telephone companies are not poles lying on the ground, but poles permanently fixed in the ground, and using a valuable property easement or right. Ground occupied by telegraph or telephone poles cannot be used for anything else. The right to occupy and use such ground is a valuable right, it is a property right, it may be treated as an element in reaching the fair assessment of the telegraphic plant. To use the words of Mr. Justice LAMAR in *St. Louis* vs. *Western Union Telegraph Company*, 148 U. S., bottom of page 98:

> "The use which the defendant (The Western Union Telegraph Company) makes of the streets is an exclusive and permanent one, and not one temporary, shifting

> and in common with the general public. . . . It as effectually and permanently dispossesses the general public as if it had destroyed that amount of the ground.
>
> "Now, when there is this permanent and exclusive appropriation of a part of the highway, is there in the nature of things anything to inhibit the public from exacting rental from the space thus occupied? Obviously not."

Accordingly, in this case, an ordinance of the City of St. Louis, charging telegraph and telephone companies the sum of $5 per annum for each and every telegraph and telephone pole erected or used by them in the streets, was sustained as constitutional.

The character of the property of telegraph companies is well described by Mr. Justice BRADLEY in his dissenting opinion in *Pullman Car Co.* vs. *Pennsylvania*, 141 U. S., bottom of page 34. Speaking of the case of the *Western Union Telegraph Company* vs. *Massachusetts*, 125 U. S., 530, he says:

> "In that case there was no question at to the situs of the property taxed. It was situate within the State, consisting of poles and wires and offices, and a general plant for telegraphic purposes."

It is this general plant for telegraphic purposes, or the portion of it in the State of Ohio, which the State Board, under the Nichols law, is created to assess.

As to an express company, it owns horses, wagons, pouches, office furniture, safes and other implements for carrying on the transportation business; but it also owns leases of transportation facilities and capital and money to operate lines extending throughout the country. A part of this property has a situs in the towns where there are offices, a part is carried to and fro throughout the State on the lines over which the express company operates. The property is

used together in one business, that of transportation, and is valuable because it is so used. An express company is akin to a railroad company. It operates over a large territory, or its property would not have the value it does. To operate lines extending over a large territory requires a considerable capital and this capital is of such a character that it can only be ascertained and valued as a unit and can not be reached and assesssed by local officers.

III.

Because of these inherent differences, it is not only proper, but wise for the State to classify the property of these companies for taxation. Such classification does not violate the constitution of Ohio and is in accord with the legislative policy of the State. There are separate provisions for the valuation of the property of individuals, of merchants, of manufacturers, of unincorporated banks, of incorporated banks, of corporations in general, of railroads, of insurance companies. The end of the law is equality of burdens, which can only be reached through classification.

The policy pursued in Ohio is to classify property for taxation, when the nature of the property or its use, or the nature of the business engaged in, requires classification in order to secure equality of burdens. This policy obtains in existing laws in Ohio, whereby property of different sorts is classified for purposes of assessment and taxation. The same officers and boards do not assess and equalize the valuation of all property in this State, notwithstanding the Constitutional provision that property shall be taxed by a uniform rule and according to its true value in money.

The usual rule is for the return of personal property to be made to a local assessor on listing day. The return thus made may be equalized or corrected by local boards. There is the further provision that county auditors, under Sections 2781 *et seq.*, may correct false returns for previous years, not exceeding five, and place on the duplicate property wrongfully omitted from taxation. The general rule, as I have said, is to return personal property on hand on listing day. But merchants do not return the value of the stock on hand on listing day, but the average value of merchandise on hand during the preceding year, or the months in which they did business. Manufacturers, before the Rawlings law was passed, returned the average value of raw material on hand during the previous year, but the finished product produced during the previous year was exempted. Now they must return the average value of both the raw material, and partly manufactured and the finished product. Special provisions are made in Sections 2758 *et seq.*, for the returns of unincorporated banks and bankers. By Section 2759, such returns are to be made to the county auditor, and not to the local assessor. The return must set forth certain items and by adding certain of these items and deducting others, a result is obtained which is regarded as the personal property of such unincorporated bank or banker, which the auditor is required to enter on the duplicate for taxation as other personal property. Incorporated banks are taxed on their capital stock, which is taken to represent the property of the company. The returns are to be made to the county auditor, who fixes (see Section 2766) the total value of the shares of the banks according to their true value in money. He transmits his valuation to the State Board of Equalization, consisting of the Governor, the Auditor of State and Attorney-General

(see Section 2808), who equalize the value of the shares, having authority to increase or diminish the valuation of the county auditor.

Under Section 2744, corporations in general list their property in a certain special way. The return is made to the county auditor, and there is a provision for the apportionment of the value of the property of the corporation among the different taxing districts. At the close of the section, the county auditor is given authority, "If of the opinion that false or incorrect valuations have been made, or that the property of the corporation or association has not been listed at its full value, * * * to proceed to have the same valued and assessed."

Under Sections 2770 et seq., Boards of County Auditors, through which railroads run, assess each railroad as an entirety, and apportion the valuation reached among the several Counties. A reading of Section 2774, providing for such apportionment, will disclose that the same language is used in the Nichols law, with regard to the apportionment of the valuation of telegraph and telephone companies, which has been used for many years in the case of railroad companies. It is provided by Section 2776, that when a railroad company has part of its road in another State, the road shall be treated as an entirety in reaching the total valuation, and the proper apportionment shall be made to determine the value of the part of the road in this State. Railroad property is equalized by a State Board (see Section 2811), consisting of the Auditor, Treasurer of State and Attorney-General.

It is apparent, from examination of these statutory provisions, that in classifying telegraph, telephone and express companies for taxation, the Legislature simply followed a

well settled rule in Ohio. A State Board is provided for the valuation of such property, because the companies do business in more than one County, some throughout the entire State, and a State Board can, with more uniformity and equality, ascertain and apportion the valuation for taxation than could local authorities.

The right to classify property for purposes of assessment is distinctly upheld by the Supreme Court of Ohio in the case of *Wagoner* vs. *Loomis*, 37 O. S., 571, 580, the first paragraph of the syllabns of which reads:

> "Statutory provisions whereby different classes of property are listed and valued for taxation in and by different modes and agencies are not necessarily in conflict with the provisions of the Constitution, which require all property to be taxed by a uniform rule and according to its true value in money."

Speaking of the claim that the diversity in the mode employed by legislation for fixing the valuation of bank property, resulted necessarily in inequality in conflict with the Constitution, Judge McIlvaine says, page 580:

> "The inequality complained of cannot in any just sense be attributed to the state of legislation on the subject. Whether it was wise to adopt different modes and agencies for determining the value of taxable property we need not consider. Much might be said in its favor. But we can and do affirm, with the utmost confidence, that an honest and intelligent discharge of the duty by those intrusted with the execution of the respective modes provided by law, would accomplish all that was intended by the constitution. A faithful execution of the different provisions of the statutes would place upon the duplicate for taxation all the taxable property of the State, whether bank stocks or other personal property or real estate, according to its true value in money, and the equality required by the constitution has no other test."

The test, therefore, according to this decision, is not uniformity in the mode of assessment in the sense that the same authorities must assess, but uniformity in the mode of assessment in the sense that the same result of assessment must follow, namely, that the property must be assessed at its true value in money.

IV.

The method of valuing the property of a telegraph company as a unit, taking the capital stock as a guide and distributing such valuation according to mileage, is a just and fair mode of assessment, which has been sustained in numerous decisions. The value of the capital stock guides but does not control.

The method of valuing the property of a telegraph company provided in the Nichols law, and distributing such valuation in the taxing districts according to mileage, is a just and fair mode of assessment, and has been sustained in numerous decisions. Under the Ohio law, the valuation of the property of a telegraph company is not controlled by the value of its capital stock. The capital stock is taken as a guide, but only as a guide. Capital stock ordinarily represents the value of the property owned by a company, at any rate it is based upon such value. It is perfectly proper for an assessing board to take the value of the capital stock as a guide in determining the value of property. It may make certain deductions in order to eliminate elements of value in the capital stock not represented by the lines of the company. Thus in this case the value of the stocks and bonds held by the Western Union in all other corporations, and the value of real estate held by it outside of Ohio was deducted before the value of the capital stock was taken as a guide. The

assessing board takes into account other rules and evidence and reaches the valuation of the property of the company in this State which it thinks is proper and just. If the value of the capital stock of a company does not, for some reason apparent to the board, serve properly as a guide in determining the value of the property, the board may disregard the value of the capital stock. What the board is required to do is to ascertain the true value of the property. It takes the capital stock and such other evidence and rules as will enable it to arrive at the true value of the property.

Suppose, and I am now giving for purposes of illustration a case which actually came before the Board, that the cost of an existing telephone or telegraph line in this State far exceeded the value of the capital stock of the company owning and operating it. In such case the capital stock could not serve as a guide, and the Board would be obliged to go on and fix the true value in money of the lines irrespective of the capital stock.

In the case of *The Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S., 380, the validity of a law similar to this, under which the property of the Western Union Telegraph Company in Massachusetts was valued, came before the Supreme Court of the United States and was held to be valid. The same objection was made in that case that is made in this, namely, that the property of the Western Union Telegraph Company situated in Massachusetts had no necessary relation to the proportion of the capital stock determined on the mileage basis; because the aggregate value of the stock might depend on the property, franchises and amount of business outside of Massachusetts, largely out of proportion to the miles of telegraph line outside of that State. It was further contended, since the Massachusetts law in terms

stated that it was a franchise tax, that it could not constitutionally apply to the taxation of the franchises, derived from the State of New York and the United States, of a corporation, such as the Western Union Telegraph Company, engaged in interstate commerce.

Mr. Justice MILLER, speaking for the Court, disposed of this argument as follows (bottom page 547):

> "But, by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation. The laws of that commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the *amount and value of the capital so employed by it therein.*"

Again, on page 552:

> "The tax in the present case, though *nominally* upon the shares of the capital stock of the company, is in effect a tax upon the organization *on account of property owned and used by it in the State of Massachusetts*, and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the *basis for ascertaining the value of that property.*"

On the same page, speaking of the objection that in ascertaining the value of the stock no deduction was made on account of the value of the real estate outside of Massachusetts (and it is proper to call the attention of the Court to the fact that in the case at bar, real estate outside of Ohio was deducted), Mr. Justice MILLER says, top of page 553:

> "We do not feel called upon to defend all the items and rules by which they (the assessing board) arrived at the taxable value on which its ratio of percentage of taxation should be assessed, and even in this case, which comes from the Circuit Court, and not from that of the State, we think it should appear that the corporation is injured by some principle or rule of the law not equally applicable to *other objects of taxation of like character.*"

Counsel attempts to dispose of this case by stating the tax was an "excise tax." He does not define what he means by an "excise tax." As has been frequently held in Ohio in cases growing out of acts to raise revenue, "there is no magic in names." Counsel for the Western Union Telegraph Company, in the Massachusetts case, attempted to dispose of the law by stating it in terms provided for a "franchise tax," but the Supreme Court held that, regardless of the terms used in the law, the tax was a valid one, for the reasons stated above.

Why the Supreme Court of the United States sustained the Massachusetts law, and just what sort of a tax that law provided for, is made plain by subsequent decisions, in which different members of the Court, citing the case in the 125 U. S., give the reason for the Court's action at that time.

Thus, in the case of *Ratterman* vs. *The Western Union Telegraph Co.*, 127 U. S., 411, in which it was held that the old Ohio law taxing telegraph companies on their gross receipts, was good as to receipts derived wholly from business within the State, but not good as to receipts from interstate business, Mr. Justice MILLER, on pages 426 and 427, refers to the decision in the case of *The Western Union Telegraph Company* vs. *Mass.*, 125 U. S., 530, and says on page 427, top:

> "We refer to this now only for the purpose of showing how easily the subject of taxation which is forbidden by the Constitution, may be separated from that which is permissible in this class of cases. The Court held in that case, that this tax, being in effect levied upon the capital stock or property of the company in the State of Massachusetts, which was ascertained upon the basis which the length of its lines in that State bore to their entire length throughout the whole country, and not upon its messages or the receipts for such messages, was a valid tax."

At the same term, in the case of *LaLoup* vs. *Mobile*, 127 U. S., 641, in which it was held that the Western Union Telegraph Co. could not be compelled to pay a license tax under any ordinance of the City of Mobile for the privilege of carrying on its business, such business being the transmission of intelligence between States, constituting interstate commerce, which cannot be taxed by a State, Mr. Justice BRADLEY, who delivered the opinion, says, page 649:

> "We have recently had before us the question *of taxing the property* of a telegraph company, in the case of *The Western Union Telegraph Co.* vs. *Mass.*, 125 U. S., 530."

Again, in the case of the *Pullman Car Co.* vs. *Penn.*, 141 U. S., 18, in which a tax on the capital stock of the car company, ascertained by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars were run in Pennsylvania, bore to the whole number of miles over which its cars were run, was held a valid tax which did not violate the commerce clause of the Constitution, the action of the Court was based on the fact, that the tax was in effect a tax upon the personal property of the company employed within the State of Pennsylvania, and having a situs there; and that the mileage method was used simply for the purpose of ascertaining what part of the equipment of the company was on the average used within the State of Pennsylvania.

On page 23, Mr. Justice GRAY cites a number of cases to the effect that there is nothing in the Constitution of laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction. Among these is the Massachusetts case in 125 U. S.

On page 25, he disposes of an objection made in this case in the following manner:

> "Much reliance is also placed by the plaintiff in error upon the cases in which this Court has decided that citizens or corporations of one State cannot be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was, therefore, held to impose a direct burden upon the commerce itself (citing a number of cases)."

He then, near the bottom of page 25, comes to the case under consideration:

> "The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on, or because of, the transportation, or the right of transit of persons or property through the State to other States or countries. The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital stock of the corporation, on account of its business within the State, is, in substance and effect a tax on that property.
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> *Gloucester Ferry Co.* vs. *Penna.*, 114 U. S., 196, 209; *Western Union Telegraph Co.* vs. *Mass.*, 125 U. S., 530, 552.
>
> "The cars of this company within the State of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the State; and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction."

Again, bottom page 26:

> "The mode which the State of Pennsylvania adopted, to ascertain the proportion of the company's

> property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles in that and other States, over which its cars were run. This is a just and equitable method of assessment; and if it were adopted by all the States through which these cars run, the company would be assessed upon the whole value of its capital stock and no more."

On page 27, he quotes from the *State Railway Tax Cases*, 92 U. S., 575, in which the Illinois law taxing railroads upon the mileage basis, was sustained, Mr. Justice MILLER delivering the opinion, and, finally, on page 28, refers to the Massachusetts case as follows:

> "So in *Western Union Telegraph Co.* vs. *Massachusetts*, 125 U. S., 530, this Court upheld the validity of the tax imposed by the State of Massachusetts upon the capital stock of a telegraph company, on account of property owned and used by it within the State."

In the dissenting opinion of Mr. Justice BRADLEY, in this case, there is the fullest and clearest statement of the ground of the decision in the Massachusetts case. Mr. Justice BRADLEY dissents on the ground that the cars of the Pullman Company, being used exclusively in interstate commerce and passing through the State of Pennsylvania only when so used, were not taxable.

In distinguishing the Massachusetts case, he says, bottom page 34, and pages 35 and 36:

> "In that case there was no question as to the situs of the property taxed. It was situated within the State, consisting of poles, and wires, and offices and a general plant for telegraphic purposes. The property belonged in Massachusetts, and was consequently taxable there. There is a phase of that case which led some of the

Justices of the Court to doubt as to the proper decision to be made. The difficulty was this, the tax was, in terms, made upon a certain proportional part of the capital stock of the company. That proportion was regulated by the number of miles of telegraph within the State as compared with the number of miles of telegraph belonging to the company in the whole countr.y It was objected that the property of the company situated in Massachusetts had no necessary relation to the said proportion of the capital stock; because the aggregate value of the stock might depend on property, franchises and amount of business outside of Massachusetts, largely out of proportion to the miles of telegraph lines outside of that State. But the difficulty of getting at the true value of the property within the State, and of adopting any other rule for ascertaining it, as well as the failure of the company to show that the rule adopted produced any unfair results, finally induced an acquiescence in the decision, but expressly on the ground that though the tax was nominally on the shares of the capital stock of the company, it was in effect a tax upon the property owned and used by it in Massachusetts, the proportional length of the lines in that State to their entire length throughout the country being merely used as the basis for ascertaining the value of that property."

He then attempts to show that the cars of the Pullman Company are not taxable in Pennsylvania, and proceeds, top of page 36:

"It is only by virtue of such of its property as is situated in Pennsylvania that the Pullman Company can be taxed there. Its capital stock, as such, is certainly not taxable there. In the case of *The Western Union Telegraph Company* vs. *Massachusetts*, THE TAX WAS ONLY ON THE GROUND THAT IT WAS A TAX ON THE PROPERTY IN MASSACHUSETTS. The idea that the capital stock, as such, could be taxed, was repudiated. The State can no more tax the capital stock of a foreign corporation than it can tax the capital of a foreign person."

In the case of *Maine* vs. *Grand Trunk Ry. Co.*, 142 U. S., 217, the Supreme Court sustained the Maine law levying an "excise tax" upon the railway companies for the privilege of exercising their franchises within the State, the tax being assessed on gross receipts, and the proportion of taxable gross receipts to be ascertained on the mileage basis.

Justices BRADLEY, HARLAN, LAMAR and BROWN dissented, and Mr. Justice BRADLEY again distinguishes the Massachusetts case as follows, bottom page 235 :

> " This Court held that the taxation of the capital stock of the Western Union Telegraph Co. in Massachusetts, graduated according to the miles of lines in that State compared with the lines in all the States, was nothing but a tax upon the property of the company."

As bearing upon the necessity of classifying the property of a Telegraph Company, and the propriety and fitness of treating the telegraphic plant as a unit and ascertaining the part of it taxable in the State upon the mileage basis, no stronger language could be quoted than that of Mr. Justice MILLER in the *State Railway Tax Cases*, 92 U. S., middle page 609 :

> " A railroad must be regarded for many, indeed for most purposes as a unit. The track of the road is but one track from one end of it to the other, and, except in its use as one track, is of little value. In this track as a whole each county through which it passes has an interest much more important than it has in the limited part of it lying within its boundary. Destroy by any means a few miles of this track within an interior county, so as to cut off the connection between the two parts thus separated, and, if it could not be repaired or replaced, its effect upon the value of the remainder of the road is out of all proportion to the mere local value of the part of it destroyed. A similar effect on the value of the interior of the road would follow the destruction of

> that end of the road lying in Chicago, or some other place where its largest traffic centres. It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole."

Every word of this applies with equal strength to the line of a telegraph company.

In Massachusetts vs. *The Western Union Telegraph Co.*, 141 U. S., page 40, 45, the case in 125 U. S., was followed and enforced. Those parts of the decision in 125 U. S., which shows that the Court sustained the tax on the ground that it was in effect a tax upon the property in Massachusettes, are quoted.

Counsel for the Telegraph Company, in the brief below, quoted from, and commented on the *Delaware Tax Case*, 18 Wallace, 206, to show that property cannot be taxed in a State by taking a proportional amount, based on mileage, of the value of the capital stock, to ascertain the value of the property in the State. Counsel insisted that the tax in the Delaware tax case was sustained upon the ground that it was not a tax upon the property of the Company, but upon the corporation itself; and that the Court conceded that if it had been a tax upon the property, it could not have been sustained.

What the Court concedes, appears from the language of Mr. Justice FIELD, bottom of page 230:

> "Assuming that the tax is upon the property of the corporation, if the ratio of the value of the property in Delaware, to the value of the whole property of the Company be less than that which the length of the road in Delaware bears to its entire length, and such is

> admitted to be the fact, a tax imposed upon the property in Delaware, according to the ratio of the length of its road to the length of the whole road, must necessarily fall upon property out of the State."

The Court, therefore, naturally and necessarily said, that upon the assumption made by the appellant, there would be difficulty in sustaining the tax. The Court goes on to hold that the tax is one on the corporation itself, and that the rule for ascertaining the proportion taxable in Delaware, is, "though an arbitrary rule, approximately just, at any rate one which the Legislature of Delaware was at liberty to adopt."

Mr. Justice FIELD then lays down this broad proposition as to the power of the State, bottom page 231:

> "The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation, or its separate corporate property. And the manner in which its value shall be assessed, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment, or rate of taxation, might be adopted, than the one prescribed by the Legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

Later decisions of this court, a number of which we have just cited, and more particularly the decisions in the *State R. R. Tax Cases*, 92 U. S.; *Kentucky R. R. Tax Cases*, 115 U. S.; *W. U. Telegraph Co.* vs. *Mass.*, 125 U. S., and *Pullman Car Co.* vs. *Penn.*, 141 U. S., show conclusively, that if the tax in the Delaware tax cases had been regarded a tax on property, the Court would not have conceded the assumption of the appellant to be true, but would have sustained the

mileage basis as a fair method of arriving at the value of the taxable property of the Railroad Company in Delaware.

Upon the propriety and validity of the method of valuation adopted in the Nichols law, I submit that the recent decisions of this Court in the Indiana Railroad Tax cases and in the Western Union Tax case are conclusive authority in favor of the State. In the Indiana Railroad Tax cases, the assessment of railroad property in that State, by treating the railroad as a unit and taking into consideration the value of its capital stock, was sustained. In the Western Union Tax case, the same method, the identical method used under the Nichols law, was held to be proper and valid.

Thus, in the case of *The P., C., C. & St. L. R. R. Co.* vs. *Backus*, 154 U. S., the Court, speaking by Mr. Justice BREWER, says, page 429:

> "In *Franklin County* vs. *Nashville, Chattanooga, etc., Railway*, 12 Lea, 521, 539, the Supreme Court of Tennessee, in a well considered opinion, which was quoted with approval by this court in *Columbus Southern Railway* vs. *Wright*, 151 U. S., 470, 479, thus referred to the means of ascertaining the value of a railroad track:
>
> "'The value of the railway at any given time is not the original cost, nor, *a fortiori*, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value can not be determined by ascertaining the value of the land included in the railway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock. No local estimate of the fraction in one county of a railroad

track running through several counties can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road.' "

In the case of *The C. C. C. & St. L. R. R.* vs. *Backus*, 154 U. S., 444, the Court speaking by Mr. Justice BREWER, uses this language:

> "Now, when a road runs into two states, each state is entitled to consider as within its territorial jurisdiction and subject to the burdens of its taxes what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road. It is not bound to enter upon a disintegration of values and attempt to extract from the total value of the entire property that which would exist if the miles of road within the state were operated separately. Take the case of a railroad running from Columbus, Ohio, to Indianapolis, Indiana. Whatever of value there may be resulting from the continuous operation of that road is partly attributable to the portion of the road in Indiana and partly to that in Ohio, and each state has an equal right to reach after a just proportion of that value, and subject it to its taxing processes. The question is, how can equity be secured between the states, and to that a division of the value of the entire property upon the mileage basis is the legitimate answer. Taking a mileage share of that in Indiana is not taxing property outside of the state."

In the case of *The Western Union Telegraph Co.* vs. *Taggart*, 163 U. S., 1, this Court speaking by Mr. Justice GRAY, after reviewing the cases referred to, says, page 18:

> "Those decisions clearly establish that a statute of a state, requiring a telegraph company to pay a tax upon its property within the state, valued at such a proportion of the whole value of its capital stock as the length of its lines within the state bears to the length of all its

lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the state, is constitutional and valid, notwithstanding that nothing is in terms directed to be deducted from the valuation, either for the value of its franchise from the United States, or for the value of its real estate and machinery situated and taxed in other states; unless there is something more showing that the system of taxation adopted is oppressive and unconstitutional."

Again, page 30:

"The allegation that 'the attempted and pretended valuation of complainant's said property by said state board of tax commissioners, in manner aforesaid, necessarily includes, and does in fact include, values which are no part of the true cash value of the property of complainant in Indiana,' is but equivalent to an assertion that the decision of the tax commissioners upon the question of fact committed by the statute to their determination was erroneous. As said by this Court in *Pittsburgh, etc., Railway* vs. *Backus*, above cited, 'Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact; and if such determination comes into inquiry before the courts, it can not be overthrown by evidence going only to show that the fact was otherwise than as so found and determined.' 154 U. S., 434, 435."

THE ASSESSMENT MADE BY THE BOARD.

The action of the State Board with respect to the valuation of the property of the Western Union Telegraph Company in Ohio, has been set forth, *supra*.

I have discussed the case of *The Western Union Telegraph Co.* vs. *Mass.*, 125 U. S., 380, and the subsequent decisions explaining and sustaining the rule adopted in that case, which it may be said here, suggested the drafting and enact-

ment of the Nichols law. The tax, though nominally upon the shares of the capital stock of the company, was sustained as in effect a tax on account of property owned and used in Massachusetts, in other words, a tax upon the capital or property of the company within Massachusetts, and the mileage basis was used as a fair method of arriving at the value of this property.

It is contended now, that the Massachusetts law was upheld because it was not shown that any unfair results to the Company flowed from its enforcement, that the mileage basis was not an unfair method as applied to a wealthy and populous State like Massachusetts. If the Court will read the portion of the decision of Mr. Justice MILLER, bottom page 552 and top page 553, the Court will see that the objection was made that in ascertaining the value of the stock no deduction was made on account of real estate outside of Massachusetts. As to this objection Mr. Justice MILLER says, "We do not see why any deduction should be made." * * "But if this were otherwise, we do not feel called upon to defend all the items and rules by which they arrived at the taxable value on which its ratio of percentage of taxation should be assessed."

But in the present case, the State Board under the Nichols law did deduct over $5,000,000 on account of real estate outside of Ohio. If the Massachusetts rule had been adopted in Ohio the result would have been as follows:

Value of entire capital stock . . .	$81,780,713 40
Deduct bonds and stocks . . .	7,633,230 12
Balance . . .	$74,147,483 28

$\frac{\$3,223}{\$189,576}$ of $74,147,483.28, or about one-twenty-third, equals $3,223,000.00, which is the amount upon which, under the Massachusetts rule, the Telegraph Company would have to pay taxes, while under our assessment the amount is only $2,011,076.45.

In the case of *The Western Union Telegraph Co.* vs. *Taggart*, 163 U. S., 1, the Indiana law, taxing telegraph and express companies, which in all essential features is the same as the Nichols law, was sustained by this Court. The return of the company in that case showed that of the 189,576 miles, there was located in Indiana 6,436 miles. The Board assessed the miles in Indiana at $357 a mile, making a total of $2,297,652. This assessment was sustained by this Court as neither erroneous nor excessive. If the 8,272 miles in Ohio had been assessed in the year 1893 at the same rate that the 6,436 miles in Indiana were assessed by the Indiana Board that year, the assessment against the company instead of being $2,011,076.45 would be $2,953,104. In other words, if the Ohio Board had assessed the miles in Ohio at the same rate the Indiana Board assessed the miles in Indiana, the valuation would have been almost a million dollars more than actually fixed.

All the argument in this case proceeds upon the assumption that the property of The Western Union Telegraph Company cannot possibly equal the value of the capital stock. But it is not simply money paid for capital stock which goes into property, but money borrowed and represented by the funded debt of a corporation (See 154 U. S., top page 429). A company may be organized with a capital stock of a million dollars, all of which is paid in, and all of which is used to purchase property and erect a plant. Before the plant is completed, the company may borrow half a million dollars and put that into the completion of the plant. The result of borrowing the money and bonding the property of the company, will be to lower the value of the capital stock, but at the same time the tangible property of the company is increased. The company which has a paid up capital of a million dollars may have a capital stock worth only half a million and yet have tangible property worth a million and a half.

In this connection, for the information of the Court, and as setting forth facts which were before the State Board of Appraisers and Assessors, I print here a copy of the condensed general balance sheet of The Western Union Telegraph Company, under date of June 1, 1893, sworn to by its President, and filed in the office of the Commissioner of Railroads and Telegraphs of Ohio:

ASSETS.

Telegraph lines, stocks owned of leased telegraph companies that are merged into Western Union, franchises, patents, etc.,	$98,839,222.45
Stocks and bonds of leased telegraph companies received in exchange for collateral trust bonds,	8,291,000.00
Stocks of not leased telegraph and telephone companies and other securities,	7,709,713.04
Real Estate,	4,925,821.18
Supplies and material in supply department,	407,306.35
Sundry accounts receivable, etc.,	1,855,670.59
Cash in treasury and in hands of agents since remitted to treasury,	1,451,536.13
Sinking fund for redemption of bonds,	418,903.89
Total,	$123,899,173.63

LIABILITIES.

Capital Stock,	$94,820,000.00
Funded debt,	15,242,340.00
Gold & Stock Telegraph Co. for stocks of other companies held through lease of that Company until 1981,	2,264,200.00
Sundry accounts payable, etc.,	3,087,629.94
Profit and loss or surplus of income account,	8,485,003.69
Total,	$123,899,173.63

This shows that the company counts its telegraph lines as assets worth over $98,000,000.00; and yet the State Board under the Nichols law counted its lines as worth only $69,000,000.00. The total assets of the company on that date were over $123,000,000.00.

In the first statement, filed 1894, under the Nichols law, the value of all the property, moneys and credits of The Western Union Telegraph Company in Ohio was sworn to as being $708,762.42.

In the second statement, filed just before the Board made its valuation, a detailed statement of moneys and credits in this State was given which, with the return of the personal property, aggregated $933,671.58. *About* $225,000.00 *of money and credits was thus returned, which never was returned before.*

V.

The property of an express company constitutes a plant for transportation purposes. The assessment of the Ohio property did not exceed a fair proportion of the value of this plant, taking into consideration the value of the capital stock and other facts, whatever basis of apportionment may be taken. In fact, no rule of appraisement aside from that laid down in the Nichols law was adopted; the result presents the best judgment of the Board, in the light of the law and all the facts before it. If the assessment be erroneous, it is in consequence of a mistake of judgment, which the Court will neither review nor correct.

In the Jones case the assessment of the property of an express company was before the Supreme Court of Ohio. The Court held that, under the Constitution of Ohio, it is entirely proper for a board charged with the duty of appraising the property of an express company to be guided by the

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value of the property as determined by the value of the entire capital stock of the company, and such other evidence and rules as will enable the board to arrive at the true value in money of the entire property of the company within this State, in the proportion which the same bears to the entire property of the company as determined by the value of its capital stock and other evidence and rules. The Court did this because, to use its own words:

> "The property of a corporation may be regarded in the aggregate as a unit, an entirety, as a plant designed for a specific object; and its value may be estimated not in parts, but taken as a whole. If the market value—perhaps the closest approximation to the true value in money—of the corporate property as a whole, were inquired into, the market value of the capital stock would become a controlling factor in fixing the value of the property." (*Exhibit Book*, top page 136.)

The property of an express company is treated as a unit, not because it is owned by an express company, but because it is *used* by an express company in the express business. To carry on successfully the express business requires a plant for transportation purposes. Each part of this plant is valuable because of its relation to the whole, and because of the earning capacity of the entire plant. To use the words of the Circuit Court of Appeals in this case (*exhibit book*, page 114):

> "That an express company owns no line of railway, and operates no railroad does not prevent the value of its property from being affected by the relation of each part to every other part, and the use to which a part is put is a factor in a unit business. The Pullman Car Company neither owned nor operated any line of railroad. Its cars were moved by railway carriers under contracts, yet it was not regarded as violative of any Federal restriction that its property should be regarded

> as a unit plant, with a unit value, and the value of its property in Pennsylvania assessed in the proportion that the mileage of the roads over which its cars ran in that State bore to the total mileage covered by its entire business."

It is contended that all the property an express company owns is certain horses and wagons and furniture. But horses and wagons and furniture located at widely separated points cannot and do not suffice for an express business. There must be connecting lines, and capital and property to operate them. Express companies own what is virtually a lease of transportation facilities, contracts with railway and steamship lines. They have the use of cars, built especially for the express business. Under the ordinary agreement, the railroad company furnishes and runs the cars, and receives forty per cent. of the gross receipts. Express companies furnish one of the great mediums for transmission of money. They not only transport money itself, but issue money orders or letters of credit. They have a great army of employes who have to be paid, and of horses which have to be fed, and stables and wagons and other appliances to be kept in repair. Yet opposing counsel would have the Court believe that the tremendous business done by the express companies requires no capital or property except the trifling value of a few horses and wagons. According to him, $41,102.60 represents all the capital of the Adams Express Company employed and used in Ohio. He is strenuous in urging upon the Court the fact that the principal business of these express companies is interstate business; yet in 1894 the receipts of the Adams Express Company from purely Ohio business was $301,983.00.

If the interstate business was double that of the State business, then the entire receipts in Ohio that year amounted to over $900,000.00. And all this business was done with a capital of $41,102.60!

The receipts of the American Express Company from Ohio business in 1894 was $278,839, and we are asked to believe that that business and the inter-state business of at least double that amount, was transacted on a capital of $21,795!

The receipts of the United States Express Company in 1894 from purely Ohio business, was $369,166, and we are expected to credit the statement that that business and the inter-state business that went along with it, were transacted on a capital of $26,333!

Upon the point that the property of an express company constitutes a plant and may be assessed as a plant, taking into consideration the value of its capital stock and its earnings, etc., I refer the Court to the case of *The State ex rel., The American Express Company* vs. *The State Board of Assessment and Equalization*, 53 N. W. Rep., 192, decided by the Supreme Court of South Dakota, October 15, 1892. In this case the action of the State Board in assessing the property of this express company within the State, at $35,000, notwithstanding the fact that its return showed it had property amounting only to $8,956.80, was sustained. The law under which this assessment was made was in many respects similar to the Nichols law; it required express companies to return to the State Board, consisting of the Governor, Auditor, Secretary of State, State Treasurer and Attorney-General, the total number of its employes, total number of its offices, the value of all office furniture, fixtures and real estate, the number of miles of railroad over which it conducted its business, the total number of express cars owned or used, and gross earnings of the business. The record of the State Board showed that in assessing the property, the Board took into consideration the contracts which the express company had with the railroad companies

in the State, and also the earnings of the company in the State.

The Court held it had no power to review or modify the action of the Board in fixing the valuation; that the return of the company was in no sense conclusive, and the Board had the power, in view of all the facts brought before it, to fix the value of the property of the express company in the State, and in doing this, to consider the character of the contracts of the company with the railroads and its gross earnings. The Court says, page 195:

> What is there in the record before us that would warrant this Court in saying that the assessment of the relator's property is not just and reasonable, and in the ratio of individual assessments? The counsel's reply to this is that the statement made by the relator and transmitted to the State Auditor shows the true value of the property, and that, as the value fixed by the State Board greatly exceeds the value so fixed by the relator, it must necessarily be excessive. We think the position is untenable. The value fixed in the statement, is, as we have seen, given no legal effect, or made by the law evidence of its value. The value as fixed by the relator may, like other matters before the Board, be considered in determining the value of the property, but is given no greater weight than the other matters considered. It is that the Board shall 'value and assess' the property, and not the express company. Upon the Board devolves the duty of taking into consideration the gross earnings of said company, * * and any and all other matters necessary to enable it to make a just and equitable assessment of the relator's property.' The value and assessment, therefore, made by the State Board, must, we think, be conclusive in this proceeding on this Court, and must be regarded as the just and equitable value for the purpose of taxation. If the decision of the State Board was not to be final upon the question of value, why was there given to it such extensive powers in the matters it could consider in determining its value and assessing the property?"

The point was made by counsel for the express company in that case, that in taking as data the contracts with the railroad and the gross earnings of the company, the State Board in effect levied a tax upon the instruments and results of interstate commerce, but the Court held that the taxing of the property of the express company within the State did not interfere with interstate commerce, citing a number of cases.

The Nichols law required express companies to make return of certain specified facts and also "such other facts and information as the Auditor of State may require in the form of returns prescribed by him." In the blanks furnished the companies, the Auditor of State required a return of the entire receipts of these companies, as well as of the Ohio receipts. None of the companies now fighting the law returned the entire gross receipts, the flimsy excuse being that they were "unable to give" them. Of course, the object of this was to prevent the Board from obtaining the basis for arriving at the proportion of the capital stock representing capital and property owned and used in Ohio. These companies did, however, in 1894, return the whole length of lines of rail and water routes over which they were doing business, and the length of such lines within Ohio. A proportion of the capital stock taken on the mileage basis, far exceeded the value of the property assessed by the Board.

Take the case of the Adams Express Company. The value of its capital stock was $17,400,000.00. Deduct the value of the real estate outside of Ohio, $3,005,157.52, and you have left, $14,350,000.00. The miles of lines in Ohio were 2,316, the entire mileage 31,000. Take $\frac{2,316}{31,000}$ parts of this and you have $1,072,083.87.

A similar computation in the case of the American Express Company, gives $795,903.24, as the proportion of the capital stock ascertained on the mileage basis.

I cite these instances, simply to show that the Board, as Judge TAFT says in his final opinion (*Record*, Case No. 321, page 103):

> "Kept well within this construction of the law. Complainant can only secure the equitable relief it seeks by showing that the excessive valuation claimed, arose either from fraud of the assessing officers, or from the adopting an unlawful rule of appraisement. Fraud is not charged and, as we have seen, no unlawfulness appears in the mode of appraisement. Mere errors of judgment in appraisement are not the subject of review here."

In point of fact, the Board did not use any fixed method or rule in arriving at a fair proportion of the capital and property of the company taxable in Ohio. The Board took all the facts into consideration and fixed the assessment at a figure which, upon no basis of apportionment, could be regarded as a disproportionate share of the entire capital of the company, or an unjust or excessive valuation of the property in Ohio.

That the law conferred on the Board the power and charged it with the duty of doing this, exercising the while its best judgment, a reading of the Indiana Railroad cases, in 154 U. S., 421, 440, makes clear. In the first of these cases, that of the Pennsylvania Company, the State Board had raised the valuation from $8,000,000 in 1890, to $22,000,000 in 1891. The return of the company for 1891 showed an aggregate valuation of about $8,000,000. This return was sworn to by the general manager of the company. The second vice-president and general counsel of the

company, and other officers of the company, were called and testified that the value of the company's railroad was as stated in the return.

On the part of the State the only testimony was that of the Secretary of State, who testified that no assessment was made except upon the railroad track and rolling stock of the company within Indiana, and no assessment was made of any property of value outside the State. After giving these facts, Mr. Justice BREWER says, bottom page 434:

> "Upon this testimony the decision of the Court was that there was nothing to impeach the assessment made by the State Board, and in this conclusion we concur. The true cash value of the plaintiff's property in the State of Indiana in the year 1891 was a question of fact, the determination of which for the purposes of taxation was given to this special tribunal, the State Board. Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined. Here the question determined by the State Board was the value of certain property. That determination cannot be overthrown by the testimony of two or three witnesses that the valuation was other than that fixed by the Board. It is true such testimony may be competent, and was received in this case because, taken in conjunction with other testimony, it might establish fraudulent conduct on the part of the Board sufficient to vitiate its determination."

Every word of this applies to the cases before the Court. Under the Nichols law, the State Board was constituted a special tribunal, to determine the question of the value of the property of these different companies in Ohio. The Board was authorized and required to consider certain mat-

ters, such as the value of the capital stock, in reaching its conclusions; but its conclusions were of necessity reached not only under the law governing it, but in view of all the facts and information before it; and must stand as final, unless impeached on the ground of fraud or because a statute or rule was followed which worked injustice. Courts will not review and correct the errors and mistakes of taxing tribunals. Cases of individual over valuation cannot be remedied by an appeal to the Courts.

Further upon this point I refer the Court to the questions asked and ruled out in the Big Four case, 154 U. S., pages 144, *et seq.*, where the Supreme Court of the United States sustained the rulings of the lower Court declining to permit an inquiry into the mental processes of the members of the assessing board.

VI.

There is no denial of the equal protection of the law. The federal cases recognize the right of a State to classify property for taxation, and use such methods of valuation as, in the judgment of the legislature, will result in an equality of burdens.

I have already considered the claim, so far as the policy and decisions of Ohio are concerned, that the equal protection of the law is denied, because the property of these companies is classified, and a method of valuation adopted distinct from that used for individuals. The decisions of the Supreme Court of the United States recognize in the fullest and clearest way that a State may classify property for purposes of taxation, and use such methods of valuation as, in the judgment of the Legislature, will result in an equality of burdens.

In *Barbier* vs. *Connolly*, 113 U. S., 31 (a case in which an ordinance of San Francisco prohibiting work in public laundries at night was sustained), Mr. Justice FIELD says, respecting the scope of the Fourteenth Amendment, that it was undoubtedly intended, by the adoption of that amendment, to provide—

> "That equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights. * * * That no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burden should be laid upon one than are laid upon others in the same calling and conditions. * * * Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

As applied to taxation, this interpretation has been repeatedly affirmed.

In *Bell's Gap R. R. Co.* vs. *Penn.*, 134 U. S., 232, 234, the tax on moneyed securities sustained, was assailed on the ground that there was a discriminating classification. The Court held, that as the law applied to all corporate securities, there was no discrimination. Mr. Justice BRADLEY delivered the opinion. On page 237, he says, that the provision in the Fourteenth Amendment "was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways." Then he cites the various ways, in which property may be classified, and says: "We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation." Such a construction, he says, "would render

nugatory those discriminations, which the best interests of society required." He cites *Barbier* vs. *Connolly*.

In *Home Insurance Co.* vs. *New York*, 134 U. S., 594, a tax imposed by the State of New York upon the corporate franchise or business of all corporations, whether foreign or domestic, doing business within the State, to be measured by the extent of the dividends of the current year, was sustained as a tax upon the privilege of being an incorporation, and doing business within the State in a corporate capacity, and not a tax upon the privilege or franchise, which, when incorporated, the company may exercise. Therefore, its imposition upon dividends did not violate the law exempting United States bonds from taxation, although a portion of the dividends were derived from interest on capital invested in such bonds. It was claimed there was discriminating classification, depriving corporations affected of the equal protection of the laws. As to this, Mr. Justice FIELD says, bottom page 606:

> "The amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objections, if all such bodies are treated alike under similar circumstances and conditions in respect to the privileges conferred upon them, and the liabilities to which they are subjected."

In *Pacific Express Co.* vs. *Seibert*, 142 U. S., 339, in which a tax on gross receipts of express companies was sustained, Mr. Justice LAMAR says, page 351:

> "This Court has repeatedly laid down the doctrine, that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or being exempted by them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaption of property to its burdens."

In *Railroad Co.* vs. *Gibbs*, 142 U. S., 386, it was held, that a law which assessed on railroads in South Carolina the expense of a State Railroad Commission, thus classifying railroads for the purpose of imposing on them a specific burden, did not violate the guarantee of equal protection of the laws.

In *Missouri Pacific Railroad Co.* vs. *Humes*, 115 U. S., 512, a Missouri law imposing double damages on a railroad corporation for injury resulting from a neglect to fence its road, was sustained, Mr. Justice FIELD saying, bottom page 523:

> "The statute makes no discrimination against any railroad company in its requirements. * * * There is no evasion of the rule of equalities where all companies are subjected to the same duties and liabilities under similar circumstances."

In *Missouri R'y Co.* vs. *Mackey*, 127 U. S., 205, a Kansas statute, making railroad companies liable for injuries to employes resulting from the negligence of their fellow servants, was sustained. Mr. Justice FIELD, in delivering the opinion of the Court, says page 209:

> "The greater part of all legislation is special, either in the object sought to be obtained by it or in the extent of its application. * * * When legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that

> it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions."

The same objection was made in the case of the *The State R. R. Tax Cases*, 92 U. S., 575, and *Kentucky R. R. Tax Cases*, 115 U. S., 321. In each law—both the Illinois and Kentucky law—taxing railroads, the railroads were classified and assessed by separate authorities and in a special manner.

I have already quoted from Mr. Justice MILLER, on page 608 of the Illinois case, respecting the essential difference between railroad property and other property. He says, further, 92 U. S., 611, respecting the contention, that the rule of treating the road as a unit and assessing it as a whole, violates the rule of uniformity:

> "We have already discussed this question, and are of the opinion that taxes assessed by that rule on railroad property by the municipalities are uniform *when the rate of taxation is the same on the assessment thus ascertained that it is on other property.*"

In *Kentucky R. R. Tax Cases*, 115 U. S., 321, Mr. Justice MATTHEWS says, middle of page 337:

> "The rule of equality in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made between railroad companies and other corporations in the method and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justifies the discrimination in this respect, which the discretion of the Legislature has seen fit to impose."

See also bottom page 338, citing *Missouri* vs. *Lewis*, 101 U. S., 22, 30.

VII.

Due process of law is provided by the Nichols Act, both in itself and when taken in connection with other statutes. There are provisions for notice, for statements, for hearings, for review and correction of erroneous and excessive valuations, and for contesting assessments.

It is said that the property of these companies is taken without due process of law, because there is no provision for a notice to the companies and for a hearing. And there is no appeal to the Board or any superior authority for a correction of erroneous or excessive assessments.

Due process of law, is provided by the Nichols law, both in itself, and when taken in connection with other statutes of Ohio.

The law contains a notice of the time of the sessions of the Board, of which the companies must take knowledge. It provides for returns from the companies, which returns in law amount to their statement of their case. By the filing of this statement they present their case, and by considering the statement the Board hears their case as fully as if they were present. They have the right to be present if they want to make an oral statement. It is not necessary that a taxing Board should conduct assessment proceedings after the manner of trials in Court. They may act upon such evidence or information as comes to their knowledge; they may and must act largely upon their own judgment. Of necessity assessment proceedings are summary in their nature; otherwise, there would never be an end, and the taxes could not be collected. The Board under the Nichols law is a continuous board; it is not in session for a limited time and then becomes *functus officio*. Being in continuous session, complaints of erroneous or excessive valuations may at any time

be presented, heard and passed on. At any rate, such complaints may be made at any time prior to the entering on the tax duplicate in the various counties, of the apportioned valuations. And after these valuations have been entered on the tax duplicates, opportunity is afforded under *Section* 167, *R. S.*, for application to the Governor, the Auditor and Attorney-General, for a correction of illegal assessments, or of errors in the duplicate, at any time before the payment of taxes, and for a remission of taxes wrongfully charged.

Moreover, by Sections 5848 to 5852, the State provides a mode for all who complain of illegal or wrongful taxation, to enjoin the collection of taxes and have the whole matter heard in the courts.

These provisions constitute due process of law, affording not only notice and hearing before the making of the assessment, but ample opportunity after the assessment is made to appeal for its correction, or to contest at law its collection. The decisions of the Supreme Court of the United States, respecting "due process of law," are clearly to the effect that on numerous grounds the process provided by the Ohio law is fair and ample.

In *Davidson* vs. *New Orleans*, 96 U. S., 97, an assessment for drainage of swamps in Louisiana was sustained. There was no provision for a notice of hearing on the part of the property owner. But the law was sustained because the tableau of assessment was required to be filed in the Court, and an opportunity given to contest the amounts before their collection. Mr. Justice MILLER says, bottom of page 104 and top of page 105, that whenever a tax is imposed and the laws provide for a mode of confirming or contesting the charge in the courts, due process of law is provided.

In Ohio, by Sections 5848 to 5852, such opportunity of contesting a tax is afforded in all cases.

In *Hagar* vs. *Reclamation District*, 111 U. S., 701, a California assessment for reclaiming swamp land was sustained. The statute provided that the assessment should be made by commissioners, who should certify to the treasurer the amounts due. If not paid within thirty days, the treasurer was to proceed against delinquents in the manner provided for the collection of other taxes. The assessment was made without any notice, and not being paid, suits were brought to enforce the lien. The first information the owner had of the assessment was when the county treasurer demanded payment. On the bringing of the action he could resist. Summary as this proceeding was, the Court held that the opportunity to resist when sued, gave the owner hearing sufficient to constitute due process.

Mr. Justice FIELD says, bottom page 708:

> "Where the taking of property is the enforcement of a tax the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessment."

Again, middle page 710:

> "But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judiciously; and in most of the States provision is made for the correction of errors committed by them, through Boards of Revision or Equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments. The law, in prescribing the time

when such complaints will be heard, gives all the notice required, and the proceedings by which the valuation is determined, though it may be followed, if the the tax be not paid, by the sale of the delinquent's property, is due process of law."

"In some States, instead of a Boare of Revision or Equalization, the assessment may be revised by preceedings in the Courts, and be there corrected if erroneous, or set aside if invalid; or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the tax payer to be heard respecting the assessment which can be deemed essential to render the proceedings due process of law."

In *State R. R. Tax Cases*, 92 U. S., bottom page 609, Mr. Justice MILLER considers the complaint made by the railroads that the State Board increased the valuation without notice and without sufficient evidence. He says:

"If a railroad company is by law entitled to such notice, surely every individual is equally entitled to it. Yet, if this be so, the expense of giving notice, the delay of hearing each individual, would render the exercise of the main function of this Board impossible. The very moment you come to apply to the individual the right claimed by the corporation in this case, its absurdity is apparent. Nor is there any hardship in the matter. This Board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or redress a wrong; and, in the business of assessing taxes, this all that can be reasonably asked."

In *McMillin* vs. *Anderson*, 95 U. S., 37, it was held, that the provision of the Louisiana law, that a person against whom taxes are assessed, may enjoin their collection and have their validity determined, constitutes due process.

The original action was an injunction to restrain the collection of a liquor license tax by seizure and sale of the

plaintiff's property, such tax having been levied without any notice or hearing.

Mr. Justice MILLER delivered the opinion. He says, page 41:

> "The mode of assessing taxes by all governments is necessarily summary, that it may be speedy and effective. By summary, is not meant arbitrary, or unequal, or illegal. It must, under our constitution, be lawfully done.
>
> "But that does not mean, nor does the phrase 'due process of law' mean, by a judicial proceeding. The nation from whom we inherit the phrase, 'due process of law' has never relied upon the courts of justice for the collection of their taxes, though she passed through a successful revolution, in resistance to unlawful taxation."

Referring to the ten days' notice required to be given of the assessment, before the taxing officers should proceed to collect by restraint, he says, paragraph bottom *page* 41:

> "Here is a notice that the party is assessed, by the proper officers, for a given sum as a tax of a certain kind, and ten days' time given him to pay it. Is not this a legal mode of proceeding? It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not, and never has been, considered necessary to the validity of a tax. And the fact that most of the States now have boards of tax revisers of tax assessments, does not prove that taxes levied without them are void."
>
> "Nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that State, as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party, and recover back the money as paid under duress, if the tax was illegal."

> "But, however that may be, it is quite certain that he can, if he is wrongfully taxed, stay the proceeding for its collection by process of injunction."

In Kentucky R.R. Tax Cases, 115 U. S., 321, Mr. Justice MATHEWS, speaking for the Court, reviews the language in the Davidson, Hager, McMillin and State Railroad Tax Cases, and, coming down to the case under consideration, held, that in fact and in law, the Kentucky Railroads had notice and a hearing. He describes, bottom page 332, the nature of the return to be made, and then says (*top of page* 333):

> "This return, made by the corporation through its officers, is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property, and may be verified and fortified by such explanations and proofs as it may see fit to insert. It is laid by the Auditor of Public Accounts, before the Board of Railroad Commissioners, and constitutes the matter on which they are to act."

Mr. Justice MATTHEWS describes the provisions for the meetings and says:

> "These meetings are public, and not secret. The time and place for holding them are fixed by law. The The proceedings of the Board are required to be made matter of record. Anyone interested has the right to be present."

As to the contention that hearing under the law was a matter of favor, and not of right, the Justice says, bottom *page* 334:

> "If the plaintiffs in error have the constitutional right to such hearing, for which they contend, the statute is properly to be construed so as to recognize and respect it, and not to deny it. The Constitution and the statutes will be construed together as one law."

Perhaps it will be insisted that this case turned on the fact that the tax had to be collected by a suit, in which its legality could be contested. As to this claim, the Ohio law providing for injunction affords as complete opportunity to contest the legality of a tax in the courts, as the Kentucky law requiring collection by suit.

In Spencer vs. *Merchant*, 125 U. S., 345, 356, an act of New York validating the assessment held invalid in the leading case of *Stewart* vs. *Palmer*, 74 N. Y., for lack of notice and hearing, was held to be good law, on the ground that the power to tax belongs exclusively to the legislative branch, and that the responsibility of the Legislature is not to the court but to the people. (See opinion of Mr. Justice GRAY, *page* 355, citing many cases.)

In *Palmer* vs. *McMahon*, 133 U. S., 660, a valuation of bank shares by a New York City assessing board was sustained, because there was a Board of Revision to which complaints might be made.

Mr Chief Justice FULLER, on page 689, says, that the imposition of taxes is in its nature administrative and not judicial; and that it is enough if the law provides a board of revision to hear complaints.

In Ohio the Auditor of State is at the head of the taxing department. He is the final authority in matters of taxation. By Section 166 he is required to instruct the Auditors of the several counties in their duties. And by Section 167 the following authority is given him:

> "He may remit such taxes and penalties thereon as he ascertains to have been illegally assessed, and such penalties as have accrued or may accrue in consequence of the negligence or error of any officer required to do any duty relating to the assessment of property for taxation, or the levy or collection of taxes, and he may, from time to time, correct any error in any assessment

> of property for taxation or in the duplicate of taxes in any county; provided, that when the amount to be remitted in any one case shall exceed one hundred dollars, he shall proceed to the office of the Governor and take to his assistance the Governor and Attorney-General, and in all such cases may remit no more than shall be agreed upon by a majority of the officers named."

As a matter of fact, this Board of Tax Remission, consisting of the Governor, the Auditor of State and the Attorney-General, is called upon from time to time to correct erroneous or excessive valuations, made by the various taxing authorities of the State, and to remit the taxes based thereon. Unquestionably, this Board could now correct any erroneous or excessive valuation in the cases now before this Court. Application under Section 167 can be made at any time to the Auditor of State. So, in Ohio, there is always a final Board of Revision for the hearing of complaints and the correction of errors.

The foregoing argument applies to the Nichols law as originally enacted in 1893. The amended law, in Section 2778*a* (*exhibit book*, top page 9), makes clear and ample provision for original hearings, for application to the Board for a rehearing and correction, and for a review of the action of the Board and a correction of an erroneous or excessive valuation by a resort to the provisions of Section 167 Revised Statutes of Ohio, (*supra* page 8).

VIII.

In the absence of an allegation of fraud, the action of the Board in fixing the valuation is conclusive, and the Court will not review its judgment to determine whether its valuation is or is not excessive. Courts do not constitute themselves taxing authorities to determine on evidence the value of property for taxation.

In *State R. R. Tax Cases*, 92 U. S., p. 610, Mr. Justice MILLER says:

> "As we do not know on what evidence the Board acted in regard to these railroads, or whether they did not act on the knowledge which they possessed themselves, and as all valuations of property is more or less matter of opinion, we see no reason why the opinion of this Court, or of the Circuit Court, should be better, or should be substituted for that of the Board, whose opinion the law has declared the one to govern in the matter."

Page 612:

> "Perfect equality and perfect uniformity of taxation as regards individuals or corporations, for the different classes of property subject to taxation, is a dream unrealized."

In *Kelley* vs. *Pittsburgh*, 104 U. S., 78, it was held that annexation of farm land to the City of Pittsburgh, and the taxation of the same as city property, did not violate the Fourteenth Amendment, whatever the individual hardship occasioned. Says Mr. Justice MILLER, middle page 80:

> "It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not we cannot here inquire. We have so often decided, that we cannot review and correct the errors and mistakes of

the State tribunals on that subject, that it is only necessary to refer to those decisions without a restatement of the argument on which they rest."

State Railroad Tax Cases, 92 U. S., 575;
Kennard vs. *Louisiana*, 92 U. S., 480;
Davidson vs. *New Orleans*, 96 U. S., 97;
Kirkland vs. *Hotchkiss*, 100 U. S., 491;
Missouri vs. *Lewis*, 101 U. S., 22;
National Bank vs. *Kimball*, 103 U. S., 732."

In *National Bank* vs. *Kimball*, 103 U. S., 732, it was held that the valuation of the shares of a National Bank would not authorize the interference of a Court, when it did not appear there was statutory discrimination against them, or discrimination resulting from a rule or principle of valuation. The *State R. R. Tax Cases*, 92 U. S., is liberally quoted. *People* vs. *Weaver*, 100 U. S., 539, *Pelton* vs. *National Bank*, 101 U. S., 143, and *Cummings* vs. *National Bank*, 101 U. S., 153, are distinguished, the discrimination in those cases resulting from statute or a general rule adopted by assessors, and not being instances of individual over-valuation.

In *Wagoner* vs. *Loomis*, 37 O. S., 571, the Supreme Court of Ohio cites and approves the case of *National Bank* vs. *Kimball*. The second and third paragraph of the syllabus state the position of the Supreme Court in unmistakable terms:

2. "As a general rule, the decision of officers and tribunals specially created and charged, in tax laws, with the duty of valuing property for taxation and equalizing such valuations, are final and conclusive."

3. "Inequalities in the valuations, made under a valid law, of property for taxation, do not constitute grounds for enjoining the tax, in the absence of fraudulent discriminations by the agents and officers charged by the law with the duty of making such valuations."

This Court considered the question of over-valuation in *Stanley* vs. *Supervisors of Albany*, 121 U. S., 535. This was a case growing out of the assessment of bank shares. Mr. Justice FIELD says, bottom page 549:

> "Over-valuation of property is not a ground of action at law for the excess of taxes paid beyond what should have been levied upon a just valuation. The Court cannot, in such cases, take upon themselves the functions of a revising or equalizing board (citing many cases)."

Williams vs. *Supervisors of Albany*, 122 U. S., p. 154, follows and affirms the last case mentioned.

To the same effect is *Albuquerque Bank* vs. *Perea*, 147 U. S., 87.

In the very recent case of *Western Union Telegraph Co.* vs. *Taggart*, 163 U. S., 1, the action of this Court in applying the above rule in the *Indiana Railroad Tax Cases* was approved, page 30:

> "As said by this Court in *Pittsburgh, etc. R'y* vs. *Backus*, above cited, 'whenever a question of fact is thus submitted to the determination of a special tribunal, its decision carries something more than a mere presumption of fact; and if such determination comes into inquiry before the Courts, it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined." 154 U. S., 434, 435.

IX.

The tax provided by the Nichols law is not in any way a tax on the interstate business carried on by these companies, but upon the property of the companies in the State of Ohio, property having a situs in Ohio, and hence taxable here. There is therefore no violation of the commerce clause of the Constitution of the United States, and no levy of a tax on property without the jurisdiction of the State.

1. In *LaLoup* vs. *Mobile*, 127 U. S., 640, 648, and *Lyng* vs. *Michigan*, 135 U. S., 161, 166, this Court, speaking in the first case by Mr. Justice BRADLEY, and in the second by Mr. Chief Justice FULLER, stated the rule in these words:

> "No State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

The tax under consideration does not come within these inhibitions; it is not a tax on "the subjects of commerce," that is, the messages transmitted by the telegraph company or the goods carried by the express companies; it is not a tax "on the receipts" of either a telegraph or express company; it is not a tax "on the occupation or business" of any of these companies. It is a tax on these companies on account of property owned and used in Ohio, and in every instance this Court has held such a tax to be valid.

In the language of this Court, speaking by Mr. Justice GRAY, in *Pullman Car Co.* vs. *Penna.*, 141 U. S., 18, 25,

where precisely the same objection was made to a tax levied on the proportion of the capital stock of a sleeping car company, ascertained on the mileage basis, on account of cars run through Pennsylvania:

> "The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on, or because of, the transportation, or the right of transit, of persons or property through the state to other states or countries. * * * The tax on the capital of the corporation, on account of its property within the state, is, in substance and effect, a tax on that property. *Gloucester Ferry Co.* vs. *Pennsylvania*, 114 U. S., 196, 209; *Western Union Telegraph Co.* vs. *Massachusetts*, 125 U. S., 530, 552."

In *C., C., C. & St. L. R. R. Co.* vs. *Backus*, 154 U. S., 439, 445, this Court, speaking by Mr. Justice BREWER, in answering the objection that to consider the capital stock of an interstate railway in assessing its property within Indiana, was to lay a burden on interstate commerce, because the value of the stock resulted largely from the use of the railway in carrying on interstate commerce, said:

> "It has been again and again said by this Court, that while no state could impose any tax or burden upon the privilege of doing the business of interstate commerce, yet it had the unquestioned right to place a property tax on the instrumentalities engaged in such commerce. See among other cases, *Marye* vs. *B. & O. R. R.*, 127 U. S., 117; *Pullman Palace Car Co.* vs. *Penn.*, 141 U. S., 18."
>
> "The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of the property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of

> that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put."

In *Western Union Telegraph Co.* vs. *Taggart*, 163 U. S., 1, the same objection to a law identical with the Nichols law, namely, that it laid a burden on interstate commerce, because the tax on the property in Indiana was ascertained by taking a proportionate amount of the capital stock, determined on the mileage basis, was overruled, the Indiana Railroad Tax cases, and the *Pullman Car Company* vs. *Penna.*, with many other cases which I have mentioned, being cited in support of the right of a state to take a proportionate amount of the capital stock as a guide in assessing the value of the property in a state, although the value of the stock was created largely by the interstate commerce business carried on.

Every time a State passes a new law taxing the capital stock or property of a railroad, telegraph, express or sleeping car company, engaged in interstate commerce, payment of the tax is resisted on the ground that a burden is being laid on interstate commerce. But, as was justly said by this Court in the case of the *State Tax on Railway Gross Receipts*, 15 Wall., 293:

> "No doubt every tax upon personal property, or upon occupations, business, or franchises, affects more or less the subjects and the operations of commerce. Yet, it is not everything that effects commerce that amounts to a regulation of it, within the meaning of the constitution."

Applying to the present case the language of Mr. Justice FIELD in the *The Delaware Railroad Tax Cases*, 18 Wall., 232:

> "The tax imposed by the act in question affects interstate commerce among the States and impedes the transit of persons and property from one State to another just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed."

Or, in the language of this Court, speaking by Mr. Justice BRADLEY, in *B. & O. R. R. Co.* vs. *Maryland*, 21 Wall., 473:

> "It (the bonus or price for the franchise in question), may, incidentally, affect transportation, it is true; but, so does every burden or tax imposed on corporations or persons engaged in that business. Such burdens, however, are imposed *diverso intuitu*, and in the exercise of an undoubted power. The State is conceded the power to tax its corporations; and yet every tax imposed on a carrier corporation affects more or less the charges it is compelled to make upon its customers."

To say that every tax is a burden upon interstate commerce which must be paid out of the income or earnings of the corporation engaged in interstate commerce, is to say that such a corporation must be held exempt from State taxes. Every tax paid by a corporation is a burden upon that corporation; it must be paid out of its receipts, and cuts down its net earnings. The tax is intended to be a burden on the corporations; it is intended to make the corporation bear a share of the burdens of the State. The real question is, not whether the tax is a burden on the corporation, but whether the property, or business, or franchise of the corporation is so owned, or conducted, or enjoyed within the State as to be subject to taxation. Over and over again this Court has held that a corporation engaged in interstate commerce business may be compelled to contribute to the revenues of the State in which it holds property, enjoys franchises, or does business. I mention some of these many cases:

State Tax on Gross Receipts, 15 Wallace, 284, 294, 295, 296. (Tax on gross receipts of Pennsylvania corporations, sustained.)

State Railroad Tax Cases, 92 U. S., 608. (Tax on property of R. R. Co. ascertained on mileage basis, sustained.)

Telegraph Co. vs. *Texas*, 105 U. S., 460. (Tax on messages wholly within the State of Texas, sustained.)

Brown vs. *Hueston*, 114 U. S., 623. (Tax on coal transported from Pittsburg to New Orleans, and held in barges on listing day, sustained.)

Western Union Tel. Co. vs. *Mass.*, 125 U. S., 530. (Tax on the property, measured by capital stock in Mass., sustained.)

Ratterman vs. *W. U. Tel. Co.*, 127 U. S., 411. Tax on receipts from business done in Ohio, sustained.)

Pullman Car Co. vs. *Mass.*, 141 U. S., 18. (Tax on capital stock or property of company within Penna., ascertained by mileage basis, sustained.)

Maine vs. *Grand Trunk Ry. Co.*, 142 U. S., 217. (Franchise tax on foreign corporations measured by gross receipts, ascertained upon the mileage basis, sustained.)

Pacific Express Co. vs. *Seibert*, 142 U. S., 354. (Tax on the receipts within the State, sustained.)

St. Louis vs. *W. U. Tel. Co.*, 148 U. S., 98. (Charge for the use of the streets by the poles of a telegraph company, sustained.)

Indiana Railroad Tax Cases, 154 U. S., 421, 439. (Tax on property of railroad company ascertained on mileage basis, taking capital stock as guide, sustained).

Postal Telegraph-Cable Co. vs. *Adams*, 155 U. S., 688. (Tax of Mississippi against telegraph company, measured by miles of line, so much a mile, and in lieu of other taxes, sustained.)

Western Union Telegraph Co. vs. *Taggart*, 163 U. S., 1. (Tax on property of telegraph company, taking proportionate amount of capital stock ascertained on the mileage basis as guide, sustained).

2. The objection that the Nichols law taxes property not within the jurisdiction of this State has already been answered. The cases cited by opposing counsel, *Hayes* vs. *Pacific Mail Steamship Co.*, 17 Howard 596; *St. Louis* vs. *Ferry Co.*, 11 Wall., 423; *Railroad Co.* vs. *Jackson*, 7 Wall., 262; *Railroad Co.* vs. *Penna.*, 15 Wall., 300, and *Gloucester Ferry Co.* vs. *Penna.*, 114 U. S., 196, were all cited by counsel who were contending against the validity of the Pennsylvania statute sustained in *Pullman Palace Car Co.* vs. *Penna.*, and were cited in the Indiana Railroad Tax cases. Of course, property which has no situs in the State and belongs to a non-resident, can not be taxed. But the property assessed under the Nichols law is property within Ohio. Neither in the case of the telegraph company or the express companies was the capital stock considered or used in such a way as to import into Ohio and tax there, what existed elsewhere. The capital stock was used only for the purpose of ascertaining the proportion of the capital of the company used in Ohio, and subject to tax here. If each state in which the telegraph company, or the express companies, own and use property and do business, should assess the capital and property after the method adopted by the State Board under the Nichols law, in no instance would the corporation have to pay a tax on more than a moderate valuation of its entire property.

In the *Pullman Car Co. case*, 141 U. S., 26, this language is used:

> "This was a just and equitable method of assessment, and if it were adopted by all the states through which these cars run, the company would be assessed upon the value of its whole capital stock and no more."

In the case at bar the companies would be assessed on between one-half and two-thirds of the value of their capital, and no more.

The whole argument on the other side is that there is a technical defect, that the property is not assessed as property should be; that a horse is a horse, and a wagon is a wagon, and each horse should be assessed as a horse and each wagon as a wagon and not as a part of the property of an express company. If, however, the Court will look at the returns, which are attached to the bills, the Court will see that no express company returned any specific horses or wagons, to be assessed by the State Board. It returned as against the name of each office a certain sum as the value of its personal property, moneys and credits. It did not state whether the amount returned was the value of a horse or a wagon or moneys or credits. The Board, therefore, did not use the capital stock of the express company to assess certain horses and wagons. It used the capital stock as a guide to determine the actual value of the personal property, moneys and credits; in other words, the amount and value of the capital and property of the express company owned and used in Ohio. The Board was not bound to accept the return of the express company as conclusive. It had a right to investigate, to consider all the facts and use its judgment in determining the amount and value of the property and capital of the express company subject to tax in Ohio. It is possible for even a telegraph or express company to make a mistake in a return for taxation. The Western Union Telegraph Company made a sworn return under this law in 1893, and a sworn return in 1894, and then came in afterwards and filed a supplementary statement, returning $225,000 of money and credits, which it had never returned before, although each return was sworn to.

Counsel says that the bills allege that among the assets of the express company is real and personal property outside of Ohio and stock and bonds worth millions of dollars, and therefore, since the Board followed the Nichols law, and considered the value of the capital stock in assessing the property, of necessity this real property and stock and bonds outside of Ohio must have been valued. This is a violent presumption. What the Board did, was to value the property in Ohio. In doing this it considered all facts bearing upon the value of the property. There is nothing to show that it took such a proportion of the capital stock as to tax property outside of Ohio. Counsel did not attempt to show that under the action of the Board, the State of Ohio was taxing more than its fair share of the capital of the express company owned and used throughout the country. After all, the attack is one on the judgment of the Board. The Board had to determine not simply the value of specific property returned, but the *amount and value* of the property and capital of the company in Ohio. This it did the best it could, and there is no charge that it acted fraudulently, but on the contrary the express admission that it acted in accordance with the Nichols law, as construed by the Supreme Court of Ohio. This, too, is what the Circuit Court and Circuit Court of Appeals found.

After all, this Court has not been in the habit of indulging in niceties of discrimination, when the validity of a State tax is under consideration. It has had little use for purely technical objections. If the contribution exacted was fair and reasonable, and resulted in no interference with interstate commerce, and had been sustained by the highest tribunal of the State, this Court has upheld it. After the Supreme Court of Ohio has held that the Nichols law does not

violate that provision of the State Constitution, which requires all property to be taxed by a uniform rule and according to its true value in money, it is too late to appeal to this Court to sustain the same technical objection, on the ground that the company is being denied the equal protection of the law.

In *Postal Telegraph Cable Co.* vs. *Adams*, 155 U. S., 688, 696, this Court upheld, as in effect a property tax, a tax upon a telegraph company in Mississippi computed on the miles of wire in the State, $3,000 on each telegraph company operating 1,000 miles or more of wire, and one dollar per mile of wire for each company operating less.

> "Property in a State belonging to a corporation," said Mr. Chief Justice FULLER in that case, (top page 696), "whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within the State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State."

Again, top page 698:

> "This exposition of the statute brings it within the rule where *ad valorem* taxes are compounded or commuted for a just equivalent, determined by reference to the amount and value of the property. Being thus brought within the rule, the tax becomes substantially a mere tax on property, and not one imposed on the privilege of doing interstate business. The substance and not the shadow determines the validity of the exercise of the power."

X.

Really, the only serious question ever raised in these cases was the constitutionality of the Nichols law, under the Ohio Constitution. The Supreme Court of Ohio, in the Jones Case, conclusively settled this question in favor of the law. Judge Taft was right in receding from his first position and following the Supreme Court of Ohio. The attack on the Jones case by opposing counsel is unwarranted.

After the decision of the Supreme Court of Ohio in the Jones case, and the decision of this Court in the Indiana Railroad Tax cases, Judge TAFT receded from his first position and followed the Supreme Court of Ohio, holding the Nichols law is not repugnant to the State Constitution. He had already held that there was no Federal question, else he would not have passed upon the State question. Subsequently, he filed a further opinion holding that the assessments were valid, and that the Board had kept well within the construction given the law by the Ohio Supreme Court. This decision of the Circuit Court was sustained by the Circuit Court of Appeals. The attempt now is to induce this Court to ignore the decision of the Supreme Court of Ohio, and take the position which Judge TAFT originally took and from which he receded. The other side relies wholly upon the reasoning of Judge TAFT in his first opinion. Really then the question resolves itself into whether this Court will adopt the views of Judge TAFT in his first opinion, or follow those of the Supreme Court of Ohio, which are identical with those of this Court in the Indiana Railroad Tax cases. Judge TAFT very properly declines to stand by his first decision. Why should this Court go back to it?

1. *The Decision of Judge Taft and the Supreme Court of Ohio Compared.*

I submit that upon all vital points, the decision of the Supreme Court of Ohio, is at variance with the first decision of Judge TAFT; that in all the particulars wherein Judge TAFT found against the law, (and which were only on state questions) the Supreme Court of Ohio found for the law.

The effect of the decision of Judge TAFT is broadly stated in the syllabus as follows;

> "A tax upon the property of a telegraph company (Nichols law, R. S., O., Section 2778*a*) determined, in part at least, by the aggregate value of the shares of its capital stock, conflicts with a constitutional provision (Constitution of Ohio, Article 12, Section 2) that the taxation of all taxable property shall be 'by a uniform rule,' because the market value of such stock bears no necessary relation or proportion to the value of the tangible property of the corporation, and because it involves elements of value, such as the good will and earning capacity of the business, which are not taxable in the State, and not used therein to determine the value of the taxable property of individuals or other corporations."

The decision of the Supreme Court of Ohio upon this point is stated in the first section of the syllabus, thus:

> "An act to amend and supplement Sections 2777, 2778, 2779 and 2780 of the Revised Statutes of Ohio, passed April 27, 1893 (90 O. L., 330), and known as the Nichols law, is not in conflict with Section 2 of Article 12 of the constitution, which provides that: 'Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property, according to its true value in money'; and is a valid law."

In reaching a conclusion as to whether the Nichols law does or does not violate Section 2 of Article 12 of the constitution, each Court had to consider and pass upon two questions, first, what is the meaning of the law, what does the law empower and require the board to do, in other words, what is the construction of the law; and, second, is the law as thus construed, in contravention of the section of the constitution referred to.

Each Court, in doing this, considered and passed upon the meaning and effect of the following sentence, found in the latter part of Section 2778*a*:

> "And said board of appraisers and assessors shall, in determining the value of the property of said companies in this State, to be taxed within the State and assessed as herein provided, be guided by the value of said property as determined by the value of the entire capital stock of said companies and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said corporation, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

As to the meaning of this language, Judge TAFT said, Exhibit book, 58:

> "The language of the legislature is by no means certain in defining the method of valuation, but this much is certain: That the board are enjoined, unless exceptional circumstances require otherwise, to consider the value of all the shares of the capital stock as a basis or controlling element in estimating the value of the real and personal property of the corporation. The capital stock is the only element of value specifically mentioned, and that occurs twice in the same involved sentence. Other evidence and rules are referred to, but they are left to the board to select or adopt. The one

thing which the board is required to consider in each case is the value of the capital stock. It is true that the board may exercise a discretion in their appraisement to give more or less evidential weight to the value of the capital stock. But here is the legislative declaration, that in every case such value must be considered, and the necessary implication is that it is an important element."

Again, bottom page 68:

"But it is said that I am wrong in construing the Nichols law to require, as an important and controlling element in the valuation of telegraph property, the market value of the capital stock of the company. * * * It does not help the law any, to point out that the market value of the stock is only to be used to determine the true value in money of the company's Ohio property; and that if, in fact, the value of stock would have no effect in the estimate, we must give controlling weight to the words which embody the standard of value fixed by the constitution. The board is enjoined to determine the value of the property to be taxed by using as a guide the value of the capital stock and other rules which shall enable them to fix, not the true value in money of the company's property, but its true value in money in proportion to the entire property of the company as determined by the capital stock and other rules. In other words, it is merely a legislative declaration, that the true value in money of the entire property of the company is determined by the entire capital stock of the company and other rules, and the true value in money of the Ohio stock is merely a proper proportion of the value of the entire property thus determined. The only construction which would eliminate the error of the law is one which would require the board to ignore the market value of the shares as an element of value."

Thus, as to the meaning of the law, Judge TAFT found that the board are bound, unless exceptional circumstances require otherwise, to give controlling effect to the value of

the capital stock in making the assessment. The value of the capital stock is the "basis or controlling element," it is "an important and controlling element" in the valuation of the property.

In the argument of this case before Judge TAFT, as before the Supreme Court of Ohio, it was contended that what the board is required to do by the Nichols law is to ascertain the true value of the property of the company. That the capital stock is taken as a guide, but only as a guide; it does not control; and if it does not avail as a guide, it may be ignored altogether. The board considers the capital stock and such other evidence and rules as will enable it to arrive at the true value of the property.

As to the construction of the law, the Supreme Court of Ohio finds as follows, sustaining the contention of the State and at variance with the holding of Judge TAFT:

> "The board, in determining the value of the company's property in the State for taxation, is not required to fix the value of such property upon the principle that the value of the entire property of the company shall be deemed the same as the value of its entire capital stock—thus making the respective values equivalent with each other. But taking the market value of the entire capital stock as a datum, the board is to be only guided thereby in ascertaining the true value in money of the company's property in this State. The statute does not bind the board to find the value of the entire property of the company equal to that of the entire capital stock. While the value of the property may be less, there may be cases, and not uncommon, in which the value of the property will exceed the value of the capital stock." (Exhibit Book, bottom p. 134, top p. 135).

As to the effect of the law, Judge TAFT held that "the only construction which would eliminate the error of the law is one which would require the board to ignore the market

value of the shares as an element of value." The Judge reached this conclusion because, in the case of the corporation affected by the law, "the market value of its capital stock has no necessary or proper relation to the value of the tangible property of the company." It has no proper relation for the reason that, in his opinion, the value of the capital stock "depends almost wholly on net earnings of the corporation," and these earnings "depend, not on the value of the visible, tangible property of the corporation * * * but on the good will of the business, its volume, the speed with which the money capital can be turned over, the business skill and experience and economy of its management," or, taking the case of a telegraph company, "its earnings, and, therefore, the value of its capital stock, is largely dependent on its good will, the honesty, skill, economy, and experience of its management, and its employes, added to its property. Its net earning capacity is also affected by business arrangements with railroad companies, and by municipal concessions of the right to use roads and streets. It seems clear to me that the market value of its capital stock has no necessary or proper relation to the value of the tangible property of the company."

On the contrary, the Supreme Court of Ohio holds that the value of the capital stock *has a necessary and proper relation to the value of the property* of a corporation and may properly be considered by an assessing board in determining the value of such property.

> "If the component parts of the whole machinery and apparatus employed in carrying on a trade or manufacturing business were sold separately, at public or private sale, to different purchasers, the market value of the capital stock might play a very unimportant part. But the property of a corporation may be regarded in the

aggregate as a unit, an entirety, as a plant designed for a specific object, and its value may be estimated not in part, but taken as a whole. *If the market value—perhaps the closest approximation to the true value in money—of the corporate property as a whole, were inquired into, the market value of the capital stock would become a controlling factor in fixing the value of the property.* Should all the stockholders unite to sell the corporate plant as an entirety, they would not be inclined to sell it for less than the market value of the aggregate shares of the capital stock. * * * The market value of the capital stock, it is urged, has no necessary relation to the value of the tangible property of the corporation. But such is the well-understood relation between the two, *that not only is the value of the capital stock an essential factor in fixing the market value of the corporate plant, but the corporate capital or property has a reflex action on the value of the capital stock.* 'Shares in a corporation,' says Mr. Morawetz, 'represent fractional interests in the entire corporate concern, and their value necessarily depends upon the real capital which the money owns. The whole and the sum of its parts must be equal.'" (Exhibit Book, p. 135 and 136.)

"If by reason of the good will of the concern, or the skill, experience, and energy with which its business is conducted, the market value of the capital stock is largely increased, whereby the value of the tangible property of the corporation, considered as an entire plant, acquires a greater market value than it otherwise would have had, it cannot properly be said not to be its true value in money within the meaning of the constitution, because good will and other elements indirectly entered into its value. The market value of the property is what it will bring when sold, as such property is ordinarily sold in the community where it is situated; and the fact that it is its market value cannot be questioned because attributed somewhat to good will, franchise, skillful management of the property or any other legitimate agency." (Page 136.)

"We discover no satisfactory reason why the selling value of the capital stock, as affected by the good will

> of the business, should be excluded from the consideration of the Board of Appraisers and Assessors under the Nichols law charged with the valuation of corporate property in this State, especially as the capital stock when paid up, practically represents at least an equal value of the corporate property." (Bottom page 137.)

Good will and skillful management, may increase the earnings of a telegraph or express company, and thus add to the value of its capital stock, but at the same time the value of the plant, the use of which makes the money, will be appreciated. The value of the plant of any corporation depends not on its passive existence but on its active use, in other words, upon its earning capacity. Upon this point, that the use to which property is put, its earning capacity, and ergo the value of the capital stock based upon it, may be considered in determining the value of the property assessed, this Court has spoken clearly in the Indiana Railroad cases.

The Indiana railroad tax law required a return of the value of the capital stock to the State Board. The State Board, in assessing the property in Indiana, made the following finding (154 U. S., top page 433):

> "In arriving at the basis for the estimate of said values, the Board has considered the cost of the construction and equipment of said road, the market value of the stocks and bonds, and the gross and net earnings of each of said roads, and all other matters appertaining thereto that would assist the Board in arriving at a true cash value of the same."

As to the propriety of this action, Mr. Justice BREWER says, that the intent of the act "was simply to reach the property of the railroads within the State," and "no intent to the contrary can be deduced from the provision requiring

the corporation to file a statement of its total stock and indebtedness, for that is one item of testimony fairly to be considered in determining the value of that portion of the property within the State. The stock and the indebtedness represent the property." (Top page 429.)

As to the means of ascertaining the value of a railroad track, the Court, quoting a decision of the Supreme Court of Tennessee, with approval, says (bottom page 429):

> "The value of the roadway at any given time is not the original cost, nor, *a fortiori*, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent land, and adding the value of the cross-ties, rails and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value for taxation of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic as evidenced by the rolling stock and gross earnings in connection with its capital stock."

Can this be true with respect to the valuation of a railroad track, and yet it be true that a telegraph line or plant must be valued by taking the original cost less depreciation of the poles, wires, brackets, insulators and instruments, which go to make up the line, without consideration of the use to which the completed line or plant is put, and its earning capacity, as evidenced by the value of its capital stock?

As stated by the Court (middle page 430), the requirement that property shall be assessed at its true cash value is a requirement that "it shall be assessed at the value which it has, as used, and by reason of its use."

> "The true value of a line of railroad is something more than an aggregation of the values of separate parts

> of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole, and each part of the road contributes not merely the value arising from its independent operation, but its mileage proportion of that flowing from a continuous and connected operation of the whole." (Page 444.)

How can this added value be ascertained, except by a consideration of the earnings, or the value of the capital stock, representing the entire railroad as one continuous line?

The distinction between taxing the earnings and taxing property, valued upon consideration of its earning capacity, is clearly drawn on page 445:

> "The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value, it is taxed upon something which is created by the uses to which it is put."

2. *Judge* TAFT *was right in receding from his first position and following the Supreme Court of Ohio.*

Notwithstanding the cases cited by opposing counsel, which I shall comment on latter, I submit, that it is clear, from a long line of decisions, that Judge TAFT did right in following the decision of the Supreme Court of Ohio. This Court has not only accepted decisions of State Courts upon the construction and validity of State statutes made after decisions in the Circuit Courts of the United States, but has

not hesitated to reverse itself and overrule its own well-considered decisions upon State questions, simply because the highest Court of the State had taken a different view of the State question involved.

Take the State Railroad Tax Cases, 92 U. S., 576. In these cases, bills of injunction were filed in the Circuit Court of the United States, to restrain the collection of taxes assessed on certain railroads in Illinois, on the ground that the tax law in question violated the constitution of Illinois. Decrees were entered in the Circuit Court perpetually enjoining the collection of taxes. (Page 592.)

It will be observed that, in the brief of the Attorney General of Illinois, pages 594-5, it is urged in support of the law, that certain objections made to its validity under the Illinois constitution, have been *overruled* by the Supreme Court of Illinois. I take it that this indicates that subsequent to the decision of the U. S. Circuit Court, the Supreme Court of Illinois had passed upon and sustained the validity of the law under the constitution of Illinois. This inference is borne out by what Mr. Justice MILLER says on pages 617-8:

> "But, if for no other reason, we should reverse the decree of the Circuit Court in these cases, because the same questions involving the same construction urged upon us here, have been decided by the Supreme Court of the State of Illinois, in a manner which leads to a reversal of these."

This is as much as to say that this Court concedes the right of the Supreme Court of Illinois, to render a decision upon a State question, leading, inevitably, to the reversal of the decree of the U. S. Circuit Court.

Mr. Justice MILLER proceeds, bottom page 617:

> "In these two cases, (the cases in the Supreme Court of Illinois), all the points arising in the present cases

> were presented to the Court, and decided adversely to the railroad companies. These questions all grew out of the validity and construction of the tax law involved in the present cases, and out of the same action of the Board of Equalization. The validity of the statute is not seriously questioned here on the ground of any conflict with the constitution of the United States. If any such claim be set up, it is sufficient to say that it is without foundation. As the whole matter then, concerns the validity of a State law as affected by the constitution of the State, that question, and the other one of the true construction of that statute, belong to the class of questions in regard to which this Court still holds with some few exceptions, that the decisions of the State Court are to be accepted as the rule of decision for the Federal Courts."

The decrees were all reversed, and the cases remanded with directions to dissolve the injunctions and dismiss the bills.

In *Fairfield* vs. *County of Gallatin*, 100 U. S., 47, this Court overruled its own decision, virtually reversing itself, because of a decision of the Illinois Supreme Court upon the construction of the constitution of that State, which had not been reported or called to the attention of this Court when it rendered its first decision, construing a certain section of the Illinois constitution. The validity of certain bonds donated in aid of a railroad were involved. The Court, speaking by Mr. Justice STRONG, said, bottom page 49:

> "In *Town of Concord* vs. *Portsmouth Savings Bank*, 92 U. S., 625, we had occasion to construe this section of the state constitution. We then held that donations by counties or other municipalities to railroad companies, were prohibited by it. * * * We were fully aware it is the peculiar province of the Supreme Court of a State, to interpret its organic law as well as its statutes, and that it is the duty as well as the pleasure of this Court to follow and adopt that Court's interpretation.

But we are not informed, when the case was decided, that any judicial construction had been given to the constitutional provision. It now appears that the Supreme Court of Illinois had previously considered it and decided," etc.

Continuing, top page 52:

"In view of all this, ought this Court to adhere to the construction we gave to the State Constitution in ignorance of the fact that the Supreme Court of the State had previously construed it in a different manner? At a very early day, it was announced, that in cases depending upon the constitution or statutes of a State, this Court would adopt the construction given by the Courts of the State when that construction could be ascertained. *Polk's Lessee* vs. *Wendell*, 9 Cranch., 87. In *Nesmith* vs. *Sheldon*, 7 Howard, 812, it is declared to be the established doctrine that this Court will adopt and follow the decisions of the State Courts in the construction of their own constitutions and statutes, when that construction has been settled by the decisions of its highest tribunal. In *Walker* vs. *State Harbor Commissioners*, 17 Wall., 648, we said: 'This Court follows the adjudication of the highest Court of the State in the construction of its statutes. Its interpretation is accepted as the true interpretation whatever may be our opinion of its original soundness.'"

Again, bottom of page 54:

"And it has been held that this Court will abandon its former decision construing a State statute, if the State Courts have subsequently given to it a different construction. In *Green* vs. *Neal's Lessee* (6 Pet., 291), the question raised was whether the Court would adhere to its own decision in such a case, or would recede from it and follow the decisions of the State Court. In two previous cases a certain construction had been given to a statute of Tennessee in supposed harmony with decisions of the State Court. But subsequently it was decided otherwise by the State Supreme Court; and it appeared

that the decisions upon which this Court had relied were made under peculiar circumstances, and were never in the State considered as fully settling the construction of the act. This Court, therefore, overruled its former two decisions, and followed the later construction adopted by the State Court. See also *Suydam* vs. *Williamson*, 24 How., 427. With much more reason may we change our decision construing a State constitution when no rights have been acquired under it, and when it is made to appear that before the decision was made the highest tribunal of the State had interpreted the constitution differently, when that interpretation within the State fixed a rule of property, and has never been abandoned."

The case of *Moores* vs. *National Bank*, 104 U. S., 625, was brought in the United States Circuit Court for the Southern District of Ohio, by a woman against a bank. The bank set up the defense of the statute of limitations. The case was carried to this Court and argued here by Hon. Alphonso Taft for the plaintiff in error, and Mr. W. M. Ramsey for the defendant in error. This Court reversed the Circuit Court for the express reason that, after the decision of the Circuit Court, the Supreme Court of Ohio rendered a decision giving a construction to the Ohio statute of limitations which sustained the right of a woman to sue under similar circumstances.

I refer to the opinion of Mr. Justice GRAY, page 629.

In *Bucher* vs. *Cheshire Railroad Company*, 125 U. S., 582, Mr. Justice MILLER states the rule in these words:

"It has been held by this Court that the decisions of the highest Court of a State in regard to the validity or meaning of the constitution of that State, or its statutes, are to be considered as the law of that State, within the requirement of this section. In *Leffingwell* vs. *Warren*, 2 Black., 599, this Court said in regard to the statute of limitation of a State: 'The construction given to a statute

> of a State by the highest tribunal of the State, is regarded as a part of the statute, and is as binding upon the Courts of the United States as the text.' "
>
> "In the case of *Luther* vs. *Bordon*, 7 Howard, 1, 40, Chief Justice TANEY said: 'The point then raised here has already been decided by the Courts of Rhode Island. The question relates altogether to a construction of the constitution and laws of that State; and the well-settled rule of this Court is, that the Courts of the United States adopt and follow the decision of the State Courts in questions which concern merely the constitution and laws of the State.' "

Mr. Justice MILLER was careful to indicate, in his opinion, that this Court did not view with approval the Massachusetts decision, which it felt obliged to follow.

In *Stutsman County* vs. *Wallace*, 142 U. S., 293, this Court reversed the decision of the Supreme Court of Dakota Territory, from which an appeal had been taken, alleging as a reason that, subsequent to the decision of the Supreme Court of the Territory, the Supreme Court of the State of Dakota had considered the territorial law involved and given it a construction which led this Court to reverse the Territorial Court.

In *Bauserman* vs. *Blunt*, 147 U. S., 647, the construction given by the Supreme Court of Kansas to a statute of limitation of that State, was followed by this Court and the U. S. Circuit Court was reversed, in a case decided by the Circuit Court prior to the decision of the State Court.

There is an able review of many cases in point by Mr. Justice GRAY in his opinion in this case.

The latest case upon this subject is the case of *Balkam* vs. *Woodstock Iron Company*, 154 U. S., 177, in which this Court follows the decision of the Supreme Court of Alabama, notwithstanding the opinion by Mr. Justice WHITE indicates

that if the question had been before the Court for original consideration, it would have reached a conclusion different from that reached by the Alabama Court.

The cases of *Burgess* vs. *Seligman*, 107 U. S., 20, and *Carroll County* vs. *Smith*, 111 U. S., 556, relied on by the other side, are readily distinguished. Both turn upon the fact that prior to the decisions of the State Courts, the parties invoking the judgment of the Federal Court, had acquired certain rights under and by virtue of certain contracts or transactions. It was these rights this Court felt bound to uphold. Thus in the Seligman case the Court says, bottom page 33:

> "When contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decisions of the State tribunal, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Court after such rights have been accrued."

And in the Carroll County case, top page 563, the Supreme Court said:

> "It (the decision of the State Court) was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into will be presumed to know and conform to."

In each of these cases, there were involved private rights growing out of certain transactions entered into before the State Court decisions. In the Seligman case, the question was whether Seligman had, as a result of certain transactions, become a stockholder in a railroad company and liable for its debts. In the Carroll County case, the question was whether certain bonds issued by the county were valid, the bonds

having been bought and paid for prior to the State decision affecting their validity.

But what rights have accrued either to the Western Union Telegraph Company or to either Express Company, under any transactions which occured prior to the decision of the Supreme Court of Ohio in the Jones case? In what way have either of these corporations been led astray by the lack of a decision of the Supreme Court of Ohio, upon the validity of the Nichols law? In what respect did either of these corporations change its position because it construed the Nichols law the way Judge TAFT first construed it, and not the way the Supreme Court of Ohio has construed it? The fact about the matter is, that neither of these corporations has in any way altered its situation, or changed its position, or entered into any contract, or been a party to any transaction, or acquired any rights, under or because of the Nichols law, or anything done under it, or by reason of a lack of a decision of the Supreme Court of Ohio as to the validity of that law. Each corporation has gone on and transacted its business in Ohio since the passage of the Nichols law as before, and the sole question is whether an Ohio law requiring the property of certain corporations to be assessed by a certain Board in a certain way, is or is not a valid law under the Constitution of Ohio. No corporation acquires any vested right under a taxing law; the legislature can change any taxing law whenever it sees fit, keeping within the powers conferred by the Constitution, and no corporation can object to it. This case, instead of being akin to the Seligman and Carroll County cases, is in principle on all fours with the long line of cases sustaining the conclusive character of the construction given by the highest Court of the State to the statutes of limitations of the State, no matter

when the decision may have been rendered. A tax law, like a statute of limitation, is a part of the public law of the State, which is not presumed to be in existence but for a day, but continuously and for an indefinite time, and which right along concerns the administration of the affairs of the State, and the rights of innumerable persons and corporations. It is of the utmost importance that there be an ultimate tribunal for determining the validity and construction of a tax law. Every decision upon such a law affects, not simply the litigants, but the State and all citizens and corporations affected by the law. Judge TAFT, in his first decision recognized all this. I quote:

> "I have reached the conclusion that this law is unconstitutional with great reluctance. It is exceedingly embarrashing for a Federal Court to pass upon the validity of a State law under a State Constitution, in advance of the Supreme Court of a State, which is the ulitmate tribunal on all such questions. . . . If I could avoid passing on the question before the State Supreme Court shall have passed on it, with a due sense of my judicial obligation to litigants who, under the constitution and laws of the United States, have the right to invoke my judgment, I would gladly do so."

Judge TAFT thus recognized that the Supreme Court of Ohio is the ultimate tribunal upon the question involved in this case, and the ultimate tribunal has spoken and held the law valid. There cannot be two ultimate tribunals upon a question of this sort; there cannot be, in the nature of things, two ultimate tribunals upon a State question of this character, the Supreme Court of Ohio and the Supreme Court of the United States. There cannot be one ultimate tribunal upon this question for foreign corporations, who raise it, and another ultimate tribunal for domestic corporations who raise it. The Supreme Court of Ohio gave careful

consideration to the Jones case. The Nichols law applies to domestic, as well as foreign corporations. The domestic corporations, notably the telephone companies, have paid, although their valuations were raised more than that of the Western Union. These domestic companies cannot sue in the United States Court. If they desire to raise the question of the validity of this law under the Constitution of Ohio, they must do it in the State courts. Suppose an Ohio telephone company were to refuse to pay the tax, and attack the validity of the Nichols law under the Constitution of Ohio, what would be the result of the suit when it got into the Supreme Court of Ohio? The Supreme Court would stand by the decision in the Jones case. Could the company carry the case further and invoke the judgment of this Court upon the Ohio question? Of course it could not. This being the case, is it possible that the Federal Court will extend to foreign corporations a degree of protection, not under the Federal Constitution, but under the Constitution of Ohio, which the Supreme Court of Ohio does not accord to its own corporations? Are we to have in operation in Ohio a law which, under the Ohio Constitution, is at the same time constitutional and unconstitutional, dependant on the forum wherein its validity may be attacked?

3. *The Attack on the Jones Case.*

It is charged that the Jones case was a moot case, in which no controversy was involved, a case unworthy the consideration of the Supreme Court of Ohio, and a case in 8 How., page 251, is cited, in which Mr. Chief Justice TANEY said that an attempt to obtain an opinion of the Court by the presentation of a moot case in which there was no controversy, was "an abuse which courts of justice have always reprehended and *treated as a punishable contempt of court.*"

If the Jones case was this sort of a case, not proper to be considered by the Supreme Court of Ohio, it was the duty of the counsel on the other side, knowing the facts as they did, and having been advised, as they were, of the institution of the suit, to bring the entire matter to the attention of the Supreme Court of Ohio. If opposing counsel did not do so, they were at fault and cannot complain. If they did do so, —and in point of fact they did—then the question as to whether the Jones case was or was not a proper case for the Supreme Court of Ohio to consider, was a question resting wholly within the decision of that Court. It was for the Supreme Court of Ohio to say whether counsel had been guilty of contempt in presenting to it a case in which there was no controversy. It was for that court to say whether the Jones case was a moot case, or a case in which great public interests were involved, worthy of that court's immediate and careful consideration. Now, the Supreme Court passed on that question. Knowing all the facts, it held that the Jones case was a case worthy of its consideration, yes, of its immediate consideration in advance of other cases, and it treated not the case, but the attack on the case, as deserving of contempt. Having settled that question, the question was settled once and for all. It does not lie within the province of any other court to review the holding of the Supreme Court of Ohio upon a matter affecting pre-eminently its own standing and dignity as the Supreme tribunal of the State.

The facts about the Jones case are these:

When Judge TAFT, in deciding other questions in favor of the State, dismissed the National Express Company's suit, the State Board, its hands being untied, certified to the Auditor of Lucas County the valuation made by it under the

Nichols law. The Auditor of Lucas County, for the purpose of raising the question whether the Nichols law is a valid law, and imposes any duty upon the taxing officers of Ohio, refused to place the valuation upon the duplicate, and thereupon we brought a suit in mandamus in the Supreme Court of Ohio, to compel him to do so. The only question involved in the case thus brought was, whether the Nichols law is a good law or a bad law. If a bad law, it imposed no duty on the Auditor; if a good law, it did. Precisely similar suits were brought to test the Pond law and the Scott law, taxing the liquor traffic in Ohio, and no one ever thought of saying those cases were moot cases. Under the Pond law, the suit was in mandamus, on the relation of a liquor dealer, to compel the County officers to accept the tax; under the Scott law, the suit was against an Auditor to compel him to publish a notice required by law.

When the suit was instituted, it was supposed that Mr. Maxwell would be willing to present his objections to the law to the Supreme Court of Ohio, and that it would only be necessary for the Auditor to have an attorney *pro forma*. This was what was done in the Pond and Scott law cases. But Mr. Maxwell, although every opportunity was presented him to represent the opposition to the law, declined to appear before the Supreme Court of Ohio. If he had confidence in his position, why should he refuse to argue the constitutionality of an Ohio law under the Ohio constitution before the Supreme Court of Ohio, the proper tribunal to pass on that question, and the ultimate tribunal whenever it should pass on that question. After he refused, Hon. D. K. Watson, formerly Attorney General of Ohio, and now Congressman from the Columbus District, was regularly employed by the Auditor, the case was postponed for two

weeks to allow him time for preparation, and the contention against the law was fully and ably presented by him to the Court, both by printed brief and oral argument.

The claim that before the suit in the Supreme Court of Ohio was brought, the National Express Company had paid its full taxes under the Nichols law in Lucas County, is a misrepresentation of the facts. The National Express Company, before the suit in the Supreme Court of Ohio was brought, did pay the taxes in Lucas County under the old law. It did so, because Judge TAFT, at our instance, compelled it to do so. But it did so, while it still insisted that the Nichols law was void and unconstitutional. The amount thus paid by it, under the old law, was larger than the amount it would have had to pay under the Nichols law; but that would simply afford an additional reason for the Auditor refusing to put the valuation under the Nichols law on the duplicate. Under the old law, Lucas County got the advantage of the property in Lucas County; under the Nichols law, it got the advantage of a proportion, according to gross receipts, of the total valuation in the State, and the valuation thus apportioned and certified to Lucas County was smaller than what it received under the old law.

The one object of bringing that suit was to obtain a speedy decision of the Supreme Court of Ohio on the point whether the Nichols law did or did not violate the constitution of Ohio. The suit was not brought to anticipate the action of Judge TAFT in the cases before him. The delay in the decision of those cases, and the natural and proper reluctance of Judge TAFT to pass in advance of the Supreme Court of Ohio, upon a purely State question, had brought about a situation which rendered a speedy decision of this Ohio question by the Supreme Court of Ohio, imperative.

The legislature was in session and bills amending and perfecting the Nichols law were pending before it. The time was approaching when the returns of 1894 would be due and the board would again be called upon to assess the property, not only of foreign, but of Ohio corporations. The year before, the Ohio corporations, having been advised by eminent counsel that the Nichols law was constitutional, had submitted and paid the tax; but it was apparent, that, in view of the pending litigation, not an Ohio corporation would again submit to the law and pay the tax, without a decision of the Supreme Court of Ohio upon the validity of the law. So, if the Jones case had not been brought, long before this many other suits would have been brought, raising, in Ohio Courts, the Ohio question, and before this time the Ohio question would have been decided by the Ohio Supreme Court.

The Jones case was a test case; it was a friendly suit in the sense indicated; it saved a lot of costly litigation. We represented it in but one side, that of the State. We did not seek either to represent, or control, or suppress the other side, that of opposition to the law. Any charge, or suggestion, or intimation that we did so, is false. The idea of controlling both sides of the case, of having only one side presented to the Supreme Court of Ohio, never suggested itself to us. We wanted the Supreme Court to have all the light possible upon the nature and validity of the Nichols law. Our only anxiety was to have the constitutional question fully and clearly presented, that the Court might sooner decide it one way or the other.

I have made the above statement, not in defense of the Supreme Court of Ohio for considering and deciding the Jones case, but to present a plain statement of fact in reply to the misrepresentations of the other side.

The following jurisdictional questions have been fully and clearly presented by my associate, Mr. Thomas McDougall :

(a) The resort to the courts in each case was premature. No injunction lies against the State Board ascertaining the valuation and certifying it to the county auditors. *Non constat*, but that prior to the levy the valuation may, if excessive, be corrected. Moreover, the statute provides for an injunction against the levy or collection of taxes. The suits ought, therefore, to have been brought against the county auditors.

(b) In the 1894 cases there was an improper joinder of parties defendant. The county auditors could not be joined as defendants with the Auditor of State, neither could they be joined as defendants with one another.

(c) The taxes enjoined in these cases would, if levied, have been levied in the separate counties and collected there. If paid under protest, separate suits must have been brought to recover back the taxes thus paid. To sustain the jurisdiction under the statute, which requires the amount involved to exceed $2,000, each bill must show that the amount involved in some one county exceeded $2,000. The bills fail to show this.

In conclusion, I submit:

First—The Nichols law in itself violates neither the constitution of Ohio nor the constitution of the United States. The Supreme Court of Ohio, in the Jones case, settled the validity of the law under the constitution of Ohio. This Court, in the recent Indiana Tax cases, (as to railroads, 154 U. S., 421, 439, as to telegraphs, 163 U. S., 1), settled the validity of similar laws under the constitution of the United States.

Second—There is nothing in the record to impugn successfully the validity of the valuations made by the Board under the Nichols law. No fraud was charged, and no unlawful rule of appraisement shown. The only rule followed was that laid down in the law. While in each case the Board treated the entire property of the corporation as a plant, with a certain earning capacity, it assessed only that part of the plant within Ohio. In each instance, the valuation presents the best judgment of the Board, in the light of the law and all the facts before it. The whole matter resolves itself finally into a difference of opinion between the Board and the companies as to the amount and value of the property in Ohio, and with such differences this Court is not in the habit of concerning itself.

Respectfully submitted,

JOHN K. RICHARDS,

Of Counsel for Appellees.

F. S. MONNETT, *Attorney General,*
JOHN L. LOTT, *Ass't Attorney General,*
THOMAS McDOUGALL,

Of Counsel for Appellees.

APPENDIX.

And afterwards, to-wit, on the 21st day of December, A. D. 1894, the following proceedings of the State Board of Appraisers was filed in the Clerk's office of said Court, clothed in the words and figures following, to-wit:

PROCEEDINGS OF THE STATE BOARD OF APPRAISERS IN 1894.

OFFICE OF THE AUDITOR OF STATE OF OHIO.

COLUMBUS, OHIO, June 4, 1894.

This day the State Board of Appraisers and Assessors of the property of express, telegraph and telephone companies doing business in Ohio, met pursuant to law.

Present: E. W. Poe, Auditor of State, and ex-Officio President of the Board; and W. T. Cope, Treasurer of State. J. K. Richards, Attorney-General, was absent.

On motion of the Treasurer of State, the Attorney-General was elected Secretary of the Board.

The Auditor of State reported to the Board that the returns, statements and schedules required to be made to him by express, telegraph and telephone companies, had not yet been filed with him, and he was, therefore, unable to lay the same before the Board according to law.

On motion the Board adjourned to meet at the call of the President.

E. W. POE, *President.*

J. K. RICHARDS, *Secretary.*

OFFICE OF THE AUDITOR OF STATE OF OHIO.

COLUMBUS, OHIO, August 16, 1894.

The Board met pursuant to a call of the President, all the members being present. The minutes of the last meeting were read and approved.

The Auditor of State reported to the Board that complete returns had not yet been received by him from all the companies. He was requested to insist on immediate returns.

The Auditor of State having informed the Board that certain telephone companies desired a hearing previous to the fixing of the assessment of their property in this State, on motion, the Auditor of State was directed to notify the telephone companies that the Board would hear them on Wednesday, August 22, 1894.

On motion, the Board adjourned to meet August 22, 1894.

E. W. POE, *President.*

J. K. RICHARDS, *Secretary.*

OFFICE OF THE AUDITOR OF STATE OF OHIO.

COLUMBUS, OHIO, August 22, 1894.

The Board met pursuant to adjournment, all the members being present.

The minutes of the last meeting were read and approved.

Hon. J. B. Foraker, representing the City and Suburban Telephone Company, of Cincinnati, appeared and was heard by the Board on the matter of the valuation of the property of that company.

Hon. Emmett Tompkins, representing the Central Union Telephone Company, of Chicago, and the Cleveland Tele-

phone Company, of Cleveland, Ohio, appeared and was heard by the Board on the matter of the valuation of the property of said companies in Ohio.

The Board proceeded to consider the returns of the companies so far as received, and other matters bearing upon the value of their property in Ohio.

On motion, the Board adjourned to meet August 23, 1894.

E. W. POE, *President.*

J. K. RICHARDS, *Secretary.*

OFFICE OF THE AUDITOR OF STATE OF OHIO.

COLUMBUS, OHIO, August 23, 1894.

The Board met pursuant to adjournment, all the members being present.

The minutes of the last meeting were read and approved.

Consideration of the matter of the valuation of the property of the companies was resumed. In connection with the returns of the Western Union and Postal Cable Telegraph Companies, the Board sent for and inspected the sworn statements filed by these companies in the office of the Commissioner of Railroads and Telegraphs of Ohio.

The Auditor of State, by direction of the Board, wired the Postal Cable Telegraph Company for the market value of its stock on the 1st of May last.

On motion, the Board adjourned to meet on the 24th day of August, 1894.

E. W. POE, *President.*

J. K. RICHARDS, *Secretary.*

OFFICE OF THE AUDITOR OF STATE OF OHIO.

COLUMBUS, OHIO, August 24, 1894.

The Board met pursuant to adjournment, all the members being present.

The minutes of the last meeting were read and approved.

Consideration of the matter of the valuation of the property of the companies under the law was resumed.

The Auditor of State, by the direction of the Board, wired the United States Express Company for the total receipts of the company for the year ending the 1st of May last, and the entire length of miles of rail and water routes over which the company did business.

On motion, the Board adjourned to meet on August 25, 1894.

E. W. POE, *President.*

J. K. RICHARDS, *Secretary.*

OFFICE OF THE AUDITOR OF STATE OF OHIO.

COLUMBUS, OHIO, August 25, 1894.

The Board met pursuant to adjournment, all the members being present.

The minutes of the last meeting were read and approved.

Consideration of the matters relating to the assessment of the property of the various companies was resumed.

The Auditor of State reported that the United States Express Company declined to give the information requested, and referred him to its attorney. The Auditor of State was directed by the Board to insist on the law being complied with, and that the return of the fact requested to be made at once.

The Secretary was authorized to employ Mr. C. O. L. Cooper to assist him in any work required in the proper transaction of the business of the Board.

On motion, the Board adjourned to meet August 27, 1894.

E. W. POE, *President.*

J. K. RICHARDS, *Secretary.*

OFFICE OF THE AUDITOR OF STATE OF OHIO.

COLUMBUS, OHIO, August 27, 1894.

The Board met pursuant to adjournment, all the members being present.

The minutes of the last meeting were read and approved.

The Auditor of State reported that he had received from Mr. Matthews, Superintendent of the United States Express Company, a telegram stating the information desired by the Board had been mailed.

The Auditor of State, by direction of the Board, wired the City and Suburban Telephone Company, of Cincinnati, and the Central Union Telephone Company, of Chicago, through their respective attorneys, for a statement of the miles of poles after the manner in which the same was returned last year.

Consideration of matters bearing upon the assessment of the property of the various companies was resumed.

On motion, the Board adjourned to meet at the call of the President.

E. W. POE, *President.*

J. K. RICHARDS, *Secretary.*

OFFICE OF THE AUDITOR OF STATE OF OHIO.

COLUMBUS, OHIO, September 1, 1894.

The Board met pursuant to a call of the President, all the members being present.

The minutes of the last meeting were read and approved.

The resignation of J. K. Richards, Attorney-General, as Secretary of the Board, having been presented and accepted, Mr. C. O. L. Cooper was, on motion, unanimously elected Secretary of the Board, and entered upon the discharge of his duties as such.

Consideration of matters relating to the assessment of the property of the companies was resumed.

The Auditor of State reported to the Board that he had notified all the express companies and telegraph companies desiring a hearing, that the Board would hear them on Tuesday, September 4, 1894, at nine o'clock A. M.

On motion, the Board adjourned to meet at the call of the President.

E. W. POE, *President.*

C. O. L. COOPER, *Secretary.*

OFFICE OF THE AUDITOR OF STATE OF OHIO.

COLUMBUS, OHIO, September 4, 1894.

The Board met pursuant to call of the President, all the members being present.

The minutes of the last meeting were read and approved.

Mr. Theo. M. Livesay appeared before the Board on behalf of the Western Union Telegraph Company, the Adams,

American and United States Express Companies, and presented a communication from Messrs. Ramsey, Maxwell and Ramsey, atttached to which was a supplemental statement from the United States Express Company, and from the American Express Company, with regard to the character of their property in this State.

Mr. Livesay also, on behalf of the Western Union Telegraph Company, filed a statement showing the value of the property, amount of moneys and credits of the Western Union Telegraph Company in the various townships and corporations in Ohio, as of May 1, 1894, the total valuation of the property, moneys and credits in said schedule being $933,671.58.

On motion, these papers were ordered filed along with the original statements and schedules of various companies for the consideration of the Board.

On motion, the Board adjourned to meet tomorrow morning at eight oclock. E. W. Poe, *President.*

C. O. L. Cooper, *Secretary.*

Office of the Auditor of State of Ohio.

Columbus, Ohio, Sept. 5, 1894.

The Board met pursuant to adjournment, all the members being present.

The minutes of the last meeting were read and approved.

The Board having given the express, telegraph and telephone companies doing business in Ohio, whose property in Ohio is hereinafter assessed, opportunity to appear and be heard personally by the Board, and having heard all companies which desired to be heard, through their officers,

agents or counsel, and having carefully considered the facts set out in the returns, schedules and supplementary statements of such companies, and all evidences of value and all matters bearing upon the question of the value of the property of the companies which, in the judgment of the Board, would assist it in arriving at the true value in money of the entire property of each of said companies within the State of Ohio, on motion, the State Board of Appraisers and Assessors unanimously fix and determine the values of the property of the express, telegraph and telephone companies, in the State of Ohio, to be taxed therein, at the amounts set out in the following table:

ASSESSED VALUES OF THE PROPERTY IN OHIO, OF EXPRESS, TELEGRAPH AND TELEPHONE COMPANIES.

Express Companies.

Name.	Assessed values.
The Adams Express Company,	$568,739.40
The American Express Company	504,802.40
The United States Express Company,	503,538.40
Wells Fargo and Company's Express,	144,121.40
The Pacific Express Company,	10,463.88
The National Express Company,	28,579.50
The Southern Express Company,	10,143.00

Telegraph Companies.

The Western Union Telegraph Company,	$2,030,807.40
The Postal Telegraph Cable Company,	149,313.20

Telephone Companies.

The City and Suburban Telegraph Association,	$576,990.00
The Central Union Telephone Company,	452,505.19
The Cleveland Telephone Company,	499,710.00
The Central District and Printing Company,	69,600.00
The Miami Telephone Company,	8,118.00
The Chillicothe and Clarksburg Telephone Co.,	900.00
The West Union and Peebles Telephone Company,	190.00
The Manchester, Bentonville and West Union Telephone Company,	300.00
The Ohio Telegraph and Telephone Company,	183,223.27

We certify the foregoing to be a correct statement of the assessments of the Companies named, for 1894.

On motion, adjourned. E. W. Poe, *President.*

C. O. L. Cooper, *Secretary.*

The State of Ohio, Franklin County, ss.

C. O. L. Cooper being sworn, says that he is the Secretary of the State Board of Appraisers and Assessors of the property of telegraph, telephone and express companies, in the State of Ohio, and that the foregoing is a true and correct copy of the minutes of said Board for the year 1894, as copied by him from the original records of the Board.

C. O. L. Cooper.

Sworn to before me this 3d day of May, 1895.

John L. Lott,

Notary Public of Franklin County, Ohio.

[SEAL]

165-194

THE

Supreme Court of the United St

OCTOBER TERM, 1896.

Appeals from U. S. Circuit Court of Appeals, Sixth Circuit.

HENRY SANFORD, President of the Adams Express Company, Appellant,
337.] vs.
E. W. POE, Auditor of the State of Ohio, et al. (Board of Appraisers), Appellees.

352.] WESTERN UNION TELEGRAPH COMPANY vs. SAME.

Cases of 1893.

SANFORD, President Adams Express Company, Appellant,
338.] vs.
E. W. POE, Auditor of State, et al., Appellees.

339.] FARGO vs. SAME.

340.] PLATT vs. SAME.

405.] WESTERN UNION TELEGRAPH COMPANY vs. SAME.

Cases of 1894.

Appeals from U. S. Circuit Court, Southern District of Ohio.

SEWARD, Vice-President Adams Express Company, Appellant,
398.] vs.
E. W. POE, Auditor of the State of Ohio, Appellee.

399.] FARGO vs. SAME.

400.] PLATT vs. SAME.

401.] WESTERN UNION TELEGRAPH COMPANY vs. SAME.

Cases of 1895.

BRIEF OF THOS. McDOUGALL,

Of Counsel for Appellees.

THE

Supreme Court of the United States,

OCTOBER TERM, 1896.

Appeals from U. S. Circuit Court of Appeals, Sixth Circuit.

337.]	HENRY SANFORD, President of the Adams Express Company, Appellant, vs. E. W. POE, Auditor of the State of Ohio, et al. (Board of Appraisers), Appellees.	Cases of 1893.
352.]	WESTERN UNION TELEGRAPH COMPANY vs. SAME.	

338.]	SANFORD, President Adams Express Company, Appellant, vs. E. W. POE, Auditor of State, et al., Appellees.	Cases of 1894.
339.]	FARGO vs. SAME.	
340.]	PLATT vs. SAME.	
405.]	WESTERN UNION TELEGRAPH COMPANY vs. SAME.	

Appeals from U. S. Circuit Court, Southern District of Ohio.

398.]	SEWARD, Vice-President Adams Express Company, Appellant, vs. E. W. POE, Auditor of the State of Ohio, Appellee.	Cases of 1895.
399.]	FARGO vs. SAME.	
400.]	PLATT vs. SAME.	
401.]	WESTERN UNION TELEGRAPH COMPANY vs. SAME.	

BRIEF OF THOS. McDOUGALL,

Of Counsel for Appellees.

STATEMENT OF CASES.

Cases Nos. 337, 352, 338, 339, 340, and 405 are appeals from the judgment of the Circuit Court of Appeals for the Sixth Circuit, and cases Nos. 398, 399, 400, and 401 are appeals direct from the judgment of the Circuit Court in the Sixth Circuit, Southern District of Ohio. The appellants ask that the judgments of these courts be reversed. The principal questions in the cases are the same, and they will be argued together.

The suits were brought to enjoin the valuation of the property of the various appellants, for taxation, in the State of Ohio, under the provisions of the law known as the Nichols law. This law, passed in 1893, and amended in 1894, is to be found in both its original and amended forms, in Exhibit Book, pp. 1–11. Without going into detail in this brief, the main features of the law are as follows:

It provides for the valuation for taxation of the property of all persons, firms or corporations engaged in the telegraph, telephone, and express business, and employed by them in the State of Ohio according to its true value in money, by a state board created for that purpose. Upon the valuation of the property thus made, there is levied the same rate of tax paid by all of the other property in Ohio. It treats all telegraph, telephone, and express companies, wherever incorporated, in the same manner. Nearly all of the telephone companies are Ohio corporations, and the law in no manner discriminates against corporations of other states. It treats all persons, firms, and corporations engaged in the telegraph, telephone, and express business in the same manner, and subjects them to the same taxes and the same method of valuation.

The law provides the following method and machinery for this valuation:

First. That the Treasurer, Attorney-General, and Auditor of State shall constitute a Board of Appraisers and Assessors for such express, telegraph, and telephone companies, of which said Board the State Auditor shall be president. Any person or persons, joint stock association or corporation, wherever incorporated, doing a telegraph, telephone or express business, in Ohio, is defined by the law to be a "company," and is subject to the provisions of the law. It is the duty of the board to ascertain the entire value in money of the property of each of these companies, in the State of Ohio, subject to taxation, and report the same to the auditor of state, who shall apportion the amount among the various counties, to be placed on the tax list or duplicate by each county auditor, to be assessed for taxation as other property. This board has full power in the matter of inspection of books, documents, examination under oath, etc.

Second. For the information of the board, and to furnish it with the necessary data for the valuation of the property of the companies named, every telegraph, telephone, and express company doing business in this state, is required to make an annual return to the auditor of state of the following matters:

1. The whole number of shares of the capital stock of the company, and the par value of each; also, the market value, or the actual value, of the capital stock.

2. A detailed statement of the real estate owned by the company in Ohio, where situate, and the value thereof as assessed for taxation; also, the total value of the real estate owned by the company outside of Ohio.

3. A full and correct inventory of the personal property, including the moneys and credits owned by the companies in Ohio on the first day of May, where situate, and the value

thereof; also, the total value of the personal property outside of Ohio.

4. In the case of telegraph and telephone companies, the whole length of their lines, and the length of that portion in the State of Ohio; in the case of express companies, the whole length of the lines of rail and water routes over which the company does business, and the length of that portion of such routes which is in the State of Ohio.

5. In the case of telegraph and express companies, the entire gross receipts of the companies, and the gross receipts in the State of Ohio.

6. Such other facts and information as the auditor of state may require, or as the companies may desire to give.

Third. With this information before it, in the language of the law (Exhibit Book, p. 8):

"The said board shall proceed to ascertain and assess the value of the property of said express, telegraph and telephone companies in Ohio, and in determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, said board shall be guided by the value of said property, as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

The construction given by the Supreme Court of Ohio to this law in this respect, in the case of *State ex rel.* v. *Jones*, 51 Ohio St. 492, and found on page 122 of the Exhibit Book in these cases, is as follows (p. 134–5, Ex. Bk.):

"The board in determining the value of the company's property in this state for taxation, is not required to fix the value of such property upon the principle that the value of the entire property of the company shall be deemed the same as

the value of its entire capital stock—thus making the respective values equivalents of each other. But taking the market value of the entire capital stock as a datum, the board is to be only guided thereby in ascertaining the true value in money of the company's property in this state. The statute does not bind the board to find the value of the entire property of the company equal to that of the entire capital stock."

Upon the value thus ascertained, there is levied the same rate of tax as is levied on all other property in Ohio.

Fourth. The provisions of the law as to hearings are as follows (Exhibit Book, p. 9):

"At any time after the meeting of the board on the first Monday in June, and before the assessment of the property of any company is determined, any company or person interested shall have the right, on written application, to appear before the board and be heard in the matter of the valuation of the property of any company for taxation. After the assessment of the property of any company for taxation by the board, and before the certification by the auditor of state of the apportioned valuation to the several counties, as provided in section 2780, the board may, on the application of any interested person or company or on its own motion, correct the assessment or valuation of the property of any company, in such manner as will, in its judgment, make the valuation thereof just and equal. The provisions of Section 167 of the Revised Statutes shall apply to the correction of any error or over-valuation in the assessment of property for taxation, by the state board of appraisers and assessors, and to the remission of taxes and penalties illegally asssed thereon."

Section 167 of the Revised Statutes, referred to, is as follows:

"Section 167. He (the auditor of state) may remit such taxes and penalties thereon as he ascertains to have been illegally assessed, and such penalties as have accrued or may accrue in consequence of the negligence or error of any officer

required to do any duty relating to the assessment of property for taxation, or the levy or collection of taxes, and he may, from time to time, correct any error in any assessment of property for taxation, or in the duplicate of taxes in any county; provided that when the amount to be remitted in any one case shall exceed one hundred dollars, he shall proceed to the office of the governor and take to his assistance the governor and attorney-general, and in all such cases may remit no more than shall be agreed upon by a majority of the officers named."

THE HISTORY OF THE LITIGATION.

Cases Nos. 337 and 352 were entered by appellants on Nov. 23, 1893, in the Circuit Court of the United States for the Southern District of Ohio, to enjoin the board of appraisers and assessors, as above described, from certifying their action to the county auditors, to be placed upon their duplicates, on the ground that the law was in contravention of the Constitution of Ohio, and of the Constitution of the United States. A copy of the action of the board in making the valuations, is made a part of the bill, together with copies of the returns of the companies, and an affidavit of E. W. Poe, Auditor of State. To these bills and exhibits the appellees filed demurrers.

On a preliminary hearing, the Circuit Court, in an opinion filed April 23, 1894, Exhibit Book, p. 49, held that the law violated the Constitution of Ohio, but expressed itself in so doing as follows (p. 77):

"It is exceedingly embarrassing for a federal court to pass upon the validity of a state law under a state constitution in advance of the Supreme Court of the state, which is the ultimate tribunal on all such questions. *Pelton* v. *Bank*, 101 U. S. 143, 144."

Before final hearing and judgment, the Supreme Court

of Ohio, in the case of *State ex rel.* v. *Jones*, 51 Ohio St. 492, Exhibit Book, p. 122, had declared the law to be constitutional under the Constitution of Ohio, whereupon the Circuit Court, on final hearing and judgment, reversed its former opinion, and held the law to be valid under the Constitution of Ohio; that there was no federal question involved, and that the board had kept within the law in their action. The demurrers were sustained, and the bills dismissed. Appeals were taken to the United States Circuit Court of Appeals, where the judgments of the Circuit Court were affirmed, and these cases are here on appeal.

Cases 338, 339, 340, and 405 were entered by appellants Sept. 5, 1894, to enjoin Poe, Auditor of State, from certifying to the county auditors the valuations made by the state board for that year, substantially the same grounds for relief being set up as in the 1893 cases. The injunctions were issued too late, and were not served until the state auditor had certified the valuations to the county auditors. Thereupon the appellants filed amendments to their bills, attempting to join the county auditors of the state in the suits, and praying for injunctions against them, enjoining them from apportioning the amounts received by them, among the taxing districts of their respective counties, and from placing the same on their respective tax duplicates. To these bills demurrers were filed, which were sustained, the bills were dismissed, and the cases appealed to the Circuit Court of Appeals. There the judgments of the Circuit Court were affirmed, and these cases are also here on appeal.

Cases Nos. 398, 399, 400, and 401 were entered by appellants in August, 1895, against E. W. Poe, Auditor of State, as in the 1894 cases, the pleadings and exhibits being practically the same. The judgments of the Circuit Court were the same as in the other cases, and these cases are here on appeal directly from the Circuit Court.

QUESTIONS INVOLVED.

The courts below sustained the demurrers, and dismissed the bills on the following grounds:

1. The decision of the Ohio Supreme Court, in the case of *State ex rel.* v. *Jones, Auditor*, settled the question of the validity of the law under the Constitution of Ohio.

2. The law does not violate the Federal Constitution by denying due process or the equal protection of the laws, or as an interference with inter-state commerce, but is merely a tax on the property of the companies subject to taxation in the State of Ohio.

3. It appearing that the law is valid, the courts will not inquire into the question whether the assessment made under it was excessive, in the absence of a charge of fraud on the part of the state board. No such allegation is made, and the decision of that board is therefore final.

We claim that there are two additional grounds for sustaining the demurrers, as follows:

1. An injunction will not lie against the valuation of the property of these companies by a *quasi* judicial board of assessors; an injunction will only lie against the levy or collection of the tax, if then.

2. The bills do not show that the necessary amount was involved to give the court jurisdiction.

Generally speaking, we contend that these cases involve merely a question of difference of opinion between the companies and the board as to the value of the property of the companies as assessed for taxation, and that the courts will not inquire into that question in the absence of a charge of fraud or bad faith; that there are no federal questions in the cases, and that the judgments of the Circuit Court of Appeals, and of the Circuit Court, appealed from are final and should be affirmed.

ARGUMENT.

I.

THE CONSTITUTIONALITY OF THIS LAW UNDER THE OHIO CONSTITUTION IS SETTLED BY THE DECISION OF THE OHIO SUPREME COURT.

In the case of *State ex rel.* v. *Jones, Auditor*, 51 Ohio St. 492, to be found on page 122 of the Exhibit Book, the constitutionality of this act, under the Federal Constitution, and that of Ohio, was drawn directly in question, and the court decided that the law did not violate either. As to the Constitution of Ohio, this decision is conclusive and binding upon all courts. The syllabus of the case is as follows:

"1. An act to amend and supplement Sections 2777, 2778, 2779, 2780 of the Revised Statutes of Ohio, passed April 27, 1893 (90 Ohio Laws, 330), and known as the Nichols law, is not in conflict with Section 2 of Article 12 of the Constitution, which provides that 'laws shall be passed, taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property, according to its true value in money,' and is a valid law.

"2. The act of April 27, 1893, is not in violation of Section 16 of Article 1 of the Constitution, which provides that 'All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law;' nor in violation of the 14th amendment of the Federal Constitution, which provides that no 'state shall deprive any person of life, liberty, or property without due process of law.'"

It was contended by the appellants in the courts below that this decision of the Ohio Supreme Court was not binding on the federal courts in these cases, but these courts

below held that the decision of the Ohio Supreme Court was conclusive upon the question of the conformity of this law to the Ohio Constitution, as involved in the cases at bar.

The Circuit Court, in its opinion, 64 Fed. Rep. 9, and to be found on page 88 of the Exhibit Book, held as follows (p. 91):

"The question upon which the demurrer turned in this case, as it was argued by counsel and decided by the court, was whether the Nichols law was in violation of the Constitution of Ohio. The court thought that it was for the reasons stated in the opinion filed. Since that time the Supreme Court of Ohio has decided differently, and that decision is controlling, as the law of the state, whether this Court be convinced of the correctness of the reasoning in that opinion or not. The decision by the Supreme Court of Ohio, that the Nichols law is constitutional, makes it so for all practical purposes."

The Circuit Court of Appeals, in the same cases, 69 Fed. Rep. 546, Exhibit Book, 101, 104:

"Where the construction or validity of a state statute does not involve rights acquired upon the faith of earlier and conflicting decisions, it is the clear duty of federal courts to accept and adopt the decisions of the highest court of a state in respect to the construction and conformity of state laws to the constitution of the state. The decision of such questions properly belongs to the highest courts of the state. We entirely concur with the opinion of the circuit judge upon this question."

It has been repeatedly held by this court that the decision of the Supreme Court of a state is final upon the question of the conformity of a state law to the state constitution.

In the case of *P. C. C. & St. L. Ry.* v. *Backus*, 154 U. S. 421, 425, this Court said:

"The decision of the Supreme Court of the state removes from this case all questions of conflict between the act and

the constitution of the state. . . . The decision of the Supreme Court of Indiana in this case is conclusive upon us that the constitution of that state authorizes just the method of assessment adopted in this case."

There are certain cases in which the federal courts will not be bound by the decision of a state court, but this is not such a case. That class of cases is clearly distinguished by the Circuit Court in the opinion heretofore quoted. The court says (Ex. Bk. 91–93):

"In certain exceptional cases it is true that the Federal Courts do not feel bound to follow the decision of the Supreme Court of the state construing a state law or constitution. When the issue in a Circuit Court of the United States concerns transactions between individuals, entered into on the faith of a particular construction of a state law or constitution, and the Circuit Court enters a decree sustaining the validity of such construction, all before the Supreme Court of the state has expressed any opinion on the point, the Supreme Court of the United States will not reverse the decree of the court below if it otherwise approves it, simply because meantime the state court has given the law or the constitution a different construction. This was the principle in *Burgess* v. *Seligman*, 107 U. S. 32. Nor, when transactions have been entered into by individuals on the faith of a certain construction which had been given to a state statute or constitution by the Supreme Court of the United States, that court will not change its opinion, because, subsequent to the transactions involved, the state Supreme Court has taken a different view. This was the case in *Carroll County* v. *Smith*, 111 U. S. 556. Nor, when different constructions have been given to a statute or a constitution by a state court, are the Federal Courts bound to follow the later decisons if thereby contract rights which accrued under earlier rulings will be injuriously affected. This principle is established in *Douglass* v. *County of Pike*, 101 U. S. 677; *Supervisors* v. *United States*, 18 Wall. 71; and *Rowan* v. *Runnells*, 5 How. 134."

"But the case at bar calls for the application of no such principle. Here is not involved the validity or construction

of a law on the faith of which individuals have made contracts, advanced money, or incurred liability. We have here simply a tax law fixing the obligation of artificial persons of a certain class to contribute to the support of the state. In respect of such a law, it would be anomalous and absurd to have a diversity of rulings between the state and the federal courts. The intolerable result of such a diversity would be that companies who could invoke the jurisdiction of the federal court would not pay the tax while all those who could not invoke that jurisdiction would be compelled to pay it. There is nothing in the decisions of the Supreme Court of the United States which gives the slightest warrant for supposing that, in the case of a state tax law, it would not follow the decision of of the state Supreme Court, whenever rendered, and however divergent from its own views the conclusion, provided no federal question was involved."

II.

THE ONLY QUESTION RAISED BY APPELLANTS WHICH IS BEFORE THIS COURT IS WHETHER THE LAW VIOLATES THE FEDERAL CONSTITUTION.

If the law violates the Federal Constitution, then the demurrers were erroneously sustained. If the law does not violate the Federal Constitution, then the only other question raised by the appellants is the difference of opinion between them and the board of appraisers as to the value of their property. The appellants are not entitled to have this Court consider any question of difference of opinion as to the value of their property as assessed by the board for taxation merely by asserting that such action violates the Federal Constitution, unless it appears that the law under which the valuation was made does violate that Constitution. These cases are to be heard on demurrer, and if this Court decides that the action complained of does not violate the Federal Constitution, it will thereby decide that the bills

do not sufficiently allege such violation, that the facts set up in the bills do not show such violation; in other words, that facts which would raise a federal question are not alleged, and that there is no such federal question in the cases.

If appellants do not state and allege as the basis for the action of which they complain, a law which violates the Federal Constitution, then they have not stated a federal question, because otherwise the acts of the board of assessors complained of do not appear upon the bill to violate the Federal Constitution. There is, therefore, no federal question raised.

The justice of this course of reasoning seems plain. Is a person entitled to the judgment of this Court, upon a difference of opinion between himself and a tax assessor, merely by asserting that the tax assessor was acting under a certain law which violated the Federal Constitution? If so, this assertion might be then made in any case to obtain the opinion of this Court on other matters. The law is the necessary allegation of fact, and if it is not a law which violates the Federal Constitution, then there is no such violation alleged, and no federal question raised.

Without a proper and sufficient statement of the federal question, the consideration of this Court ought not to be invoked upon the remaining question of a difference of opinion between the companies and the board of appraisers and assessors on the allegations in the bills.

It follows, in the absence of a federal question in these cases, that the only ground upon which the federal court had jurisdiction of the cases, was the ground of diverse citizenship, the appellants being corporations organized under the laws of New York and citizens of that state, and the appellees being citizens of Ohio. In the cases of 1893 and 1894, which are here on appeal from the Circuit Court of Appeals, the judgment of the Circuit Court of Appeals was final. The language of the act establishing the Circuit Court of Ap-

peals, and bearing on this question, is as follows (26 U. S. Stat. 828, Sec. 6):

"The judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states."

With reference to the cases coming direct from the Circuit Court, we claim that, as there is no federal question involved, they can not be appealed directly to this Court under the provisions of Section 5 of the statute just quoted. If the appellants desired to review the action of the Circuit Court, the cases should have been appealed to the Circuit Court of Appeals, whose judgment would then have been final.

We now proceed to show that upon the facts set up in the bills, there is no violation of the Federal Constitution; in other words, that there is no federal question sufficiently alleged; that the mere assertion that the law violates certain sections of the Federal Constitution is not supported by the allegations of fact in the bill.

III.

THE ACT DOES NOT DENY TO THE APPELLANTS DUE PROCESS OF LAW, NOR EQUAL PROTECTION OF THE LAWS.

The pleadings, together with the law itself, show the following facts with reference to this subject:

1. The law itself states the times of the sessions of the board. The returns made by the companies are the statements of their cases to the boards, and they may appear if they so desire to make oral statement. Upon application, any of the companies affected has the right to appear before

the board prior to the determination of the assessment, to be heard on the question of the valuation of its property for taxation. It appears from the pleadings, as a matter of fact, that the companies were present, and were heard in the matter of the valuation of their property for taxation.

2. After the valuation of the property of any company for taxation, and before the certification by the auditor of state of the apportioned valuations to the several counties, the board may, upon the application of any interested person, or on its own motion, correct the assessment.

3. If the board refuses to correct the assessment regarded by the company as erroneous, it may appeal, under Section 167, Revised Statutes of Ohio, heretofore quoted (p. 5), to a board composed of the governor, auditor of state, and the attorney-general. This was specifically decided by the Supreme Court of Ohio in the case of *State ex rel.* v. *Jones*, heretofore cited. And this right has been specifically granted in the revision of the law in 1894, Ex. Bk., p. 9.

4. By Section 5848, Revised Statutes of Ohio, the illegal levy and collection of taxes may be enjoined; and further, if compelled to pay the tax, complainants may sue to recover it back.

It can not be questioned that these provisions and remedies, under the decisions of this Court, and of the Ohio Supreme Court, constitute due process and equal protection of the laws.

The Supreme Court of Ohio says, with reference to this law, being the law of 1893, in the case of *State ex rel.* v. *Jones, Auditor*, 51 Ohio St. 492 (Ex. Bk., p. 137).

"But it is contended, furthermore, that the Act of April 27, 1893, is in violation of Section 16 of Article 1 of the Constitution of Ohio, which provides that: 'All courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law;' and also in violation of the fourteenth amendment

of the Federal Constitution, which provides, among other things: 'Nor shall any state deprive any person of life, liberty, or property without due process of law.' The property of the express company, it is alleged, was taken without due course or process of law in this, that the act in question does not provide for any notice to the company, nor for a hearing by the board of appraisers and assessors, nor for an appeal to any superior authority for the correction of illegal, erroneous, or excessive valuations.

. . . . . .

"The law itself states the time when the board shall meet, and the express company could not ignore the time of meeting. The meetings of the board are not secret, and the company had the right to be present and explain the statement rendered of its property and the value thereof. Indeed, without notice from the board, or by the terms of the law, the company would have been unable to make the return prescribed by the statute. And of the company's return it may be said, in the language of the opinion in *The Kentucky Railroad Tax Cases*, 115 U. S. 321: 'This return, made by the corporation through its officers, is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property, and may be verified and fortified by such explanations and proofs as it may see fit to insert.'

. . . . . .

"It is said, however, that the act under consideration makes no provision for an appeal to any higher authority, board or tribunal authorized to hear complaints, and correct excessive, illegal, or erroneous assessments. The power vested in the state auditor, by Section 167 of the Revised Statutes, to correct errors of assessment, though not supplying a complete remedy, is not inapplicable, we think, to the procedure under the act of April 27, 1893. This section reads as follows: 'He may remit such taxes and penalties thereon as he ascertains to have been illegally assessed, and such penalties as have accrued or may accrue in consequence of the negligence or error of any officer required to do any duty relating to the assessment of property for taxation, or the levy or collection of taxes, and he may from time to time

correct any error in any assessment of property for taxation, or in the duplicate of taxes in any county; provided, that when the amount to be remitted in any one case shall exceed one hundred dollars, he shall proceed to the office of the governor and take to his assistance the governor and attorney-general, and in all such cases may remit no more than shall be agreed upon by a majority of the officers named.' This section is *in pari materia*, and is a part of the taxing system of the state, or of the machinery for collecting the public revenue. The Nichols law is a part of the same system, and is merely an amendment and supplement of the sections of the statute regulating express and telegraph companies. While it might seem improper to submit the *quasi* judicial action of a board composed of the treasurer, attorney-general, and auditor of state to the review of the state auditor alone, it would not seem exceptional, when the amount of taxes to be remitted exceeded one hundred dollars, that there might be an appeal to a board consisting of the governor, auditor of state, and attorney-general.

"In *Davidson* v. *New Orleans*, 96 U. S. 97, it was laid down as a general proposition, that whenever, by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or some limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

In *State R. R. Tax Cases*, 92 U. S. 575, 610, the court says:

"This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and, in the business of assessing taxes, *this is all that can be reasonably asked.*"

In the case of *McMillan* v. *Anderson*, 95 U. S. 37, the syllabus is as follows:

"The revenue laws of a state may be in harmony with the Fourteenth Amendment to the Constitution of the United States, which declares that no state shall deprive any person of life, liberty, or property without due process of law, although they do not provide that a person shall have an opportunity to be present when a tax is assessed against him, or that the tax shall be collected by suit.

2. A statute which gives a person against whom taxes are assessed a right to enjoin their collection, and have their validity judiciously determined, is due process of law, notwithstanding he is required, as in other injunction cases, to give security in advance."

See also *Kentucky R. R. Tax Cases*, 115 U. S. 321.

As the complainants are accorded due process of law, of course they have the equal protection of the law. Even if it were true, and it is not true, that their interests were less carefully guarded than those of other tax-payers, or if they had a less number of hearings, that would not be depriving them of the equal protection of the law.

In the case of *P. C. C. & St. L. Ry. Co.* v. *Backus*, 154 U. S. 421, on page 427, the court says:

"Equally fallacious is the contention that, because to the ordinary tax-payer there is allowed not merely one hearing before the county officials, but also a right of appeal with a second hearing before the state board, while only the one hearing before the latter board is given to railroad companies in respect to their property, therefore the latter are denied the equal protection of the laws. If a single hearing is not due process, doubling it will not make it so; and the power of a state to make classifications in judicial or administrative proceedings carries with it the right to make such a classification as will give to parties belonging to one class two hearings before their rights are finally determined, and to parties belonging to a different class only a single hearing."

In *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, the court says, page 351:

"This Court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed, and the various species of property selected either for bearing its burdens, or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature, or condition, or class, will be destructive of the principle of uniformity and equality in taxation, and of a just adaptation of property to its burdens."

In *Missouri Ry. Co.* v. *Mackey*, 127 U. S. 205, the court said, p. 209:

"When legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions."

In *Kentucky R. R. Tax Cases*, 115 U. S. 321, the syllabus is as follows:

"A state law for the valuation of property and the assessment of taxes thereon, which provides for the classification of property subject to its provisions into different classes; which makes for one class one set of provisions as to modes and methods of ascertaining the value, and as to right of appeal, and different provisions for another class as to those subjects; but which provides for the impartial application of the same means and methods to all constituents of each class, so that the law shall operate equally and uniformly on all persons in similar circumstances, denies to no person affected by it 'equal protection of the laws,' within the meaning of the Fourteenth Amendment to the Constitution of the United States."

The court says, on p. 337:

"The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the discretion of the legislature has seen fit to impose."

A long line of decisions establishes the proposition that classification of subjects of taxation, and the valuation and assessment of a tax upon the different classes according to different principle do not constitute a denial of due process or equal protection of the laws, but are a necessary result of the differential characteristics existing in the various subjects of taxation.

The State of Ohio classifies banking corporations, steam railroads, and other corporations, and values their property by separate boards.

IV.

THE LAW DOES NOT VIOLATE THE CONSTITUTION OF THE UNITED STATES BY INTERFERING WITH INTER-STATE COMMERCE.

The law simply provides a method for the valuation of property for taxation, and the tax laid upon the valuation made is a tax on the property of the companies in Ohio, and is not a tax upon inter-state commerce. The details of that method are all directed toward ascertaining the value in money of the property in Ohio. The tax imposed is not a license tax, nor a tax on a business or occupation, nor on ransportation through the state, nor upon receipts from

business done outside of Ohio, nor upon property outside of Ohio. The tax imposed upon the valuation made under the law is simply a tax on the property of the companies within the State of Ohio. Such a tax is not an interference with inter-state commerce in the sense in which such an interference is prohibited by the Federal Constitution.

In the case of *State Tax on Railway Gross Receipts*, 15 Wall. 293, the court says:

"No doubt every tax upon personal property, occupations, business or franchises, affects more or less the subjects and the operation of commerce. Yet it is not every thing that affects commerce that amounts to a regulation of it within the meaning of the constitution."

In the case of the *C. C. C. & St. L. Ry. Co.* v. *Backus*, 154 U. S. 445, the court says:

"It has been again and again said by this court that, while no state could impose any tax or burden upon the privilege of doing the business of inter-state commerce, yet it had the unquestioned right to place a property tax on the instrumentalities engaged in such commerce. See, among many other cases, *Marye* v. *B. & O. R. R.*, 127 U. S. 117; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18.

"The rule of property taxation is, that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value, it is taxed upon something which is created by the uses to which it is put."

Is the method of valuing the property under the law a fair method for the valuation of the property of the companies

named in the law? We answer that it is; that it is so upon principle, and that it has been recognized by this Court, again and again, as being a fair method.

Under the method laid down by the law, and followed by the board, the first inquiry is as to the value of the entire property of the corporation as a unit, wherever found. To arrive at this value, the law provides that it is to be guided by the actual value of the capital stock, and such other rules and evidence as will enable it to arrive at the true value in money of the entire property of the companies in the State of Ohio. The second inquiry is as to the proportion of the total valuation properly taxable in Ohio, and in this they are to be guided by the proportionate mileage of the routes or lines of the companies in Ohio, as compared with the entire length of such routes or lines, and such other evidence as may be presented. This is a method which it is within legislative discretion to adopt, and it is a fair method.

A. The Property of a Corporation may be Fairly Valued as a Unit for Purposes of Taxation.

This has been decided so often, and so definitely, that it would hardly seem to need additional argument. It is contended by counsel for appellants that the property of the companies included under this law should be valued item by item, and the aggregate of the values of the different items taken separately, is the value of the property of the companies for taxation. The State of Ohio claims, on the contrary, that the real value of the property of the corporations under discussion can not be ascertained by simply valuing the items of real and personal property taken separately, and finding the total. The entire property of any one of these corporations as a unit, and used for a specific purpose, and in a certain place, has a value to the corporation, by reason of its unity and the use to which it is put, which is much greater

than the value of the mere items of property taken separately. Taken together, it constitutes a plant, a machine, which has a value by reason of the assembling of its parts, the place where it is located, and the use to which it is put. This is the basis of its selling value. This fixes the selling value of its stock. This evidences the actual money invested, and which if not so invested would be taxed as money.

Take for instance a telegraph company. Its value in a certain state or in the country at large, can not be determined by finding in each county it traverses the value of poles, wires, office fixtures and other property, and calculating the total of these amounts. The wires, poles, instruments, etc., have a value by reason of their use as a telegraph line, and the system at large has a value by reason of the connection between the counties and states, and the operation of the line as a unit, which is much greater than the value of the separate items of the property, or the separate sections of the line.

Take the case of an express company also. It is true that the different elements of their property do not constitute a physical unit like the road bed of a railroad, or the wires of a telegraph company. But physical unity is not essential. The property, the assets, the contracts, and other forms of personal property, are used together for the purpose of carrying on an express business. The capital of the company, represented in its tangible and intangible property, is a unit, and is used as such, and has a value as such; and by reason of its use, in the manner and the place where used, that value is far greater than the aggregate value of the several items of personal property taken separately. The tangible personal property of an express company is not the only property used by that company in Ohio. To transact the business in Ohio, the company uses in this state a certain portion of its aggregate wealth or capital. It would be simply impossible for it to carry on its business in Ohio with only the property it

claims it ought to return, such as safes, wagons, etc. The property and capital used in Ohio has a value by reason of its use in connection with the other property and capital of the company, and it is the value of this property and capital used in Ohio which the law seeks to ascertain.

Where is this capital taxable if not in Ohio where it is used? How can the business be done without capital, and why is not the proportion of the total capital used in Ohio taxable in that state?

This method of valuation was applied in Pennsylvania to the property of the Pullman Palace Car Co. (141 U. S. 18), although that company owned no line of railroad, and although its tangible property in that state consisted entirely of palace cars, which might have been valued separately. The Circuit Court of Appeals, in its decision in these cases, said (Exhibit Book, 114):

"That an express company owns no line of railway, and operates no railroad, does not prevent the value of its property from being affected by the relation of each part to every other part, and the use to which a part is put as a factor in a unit business. The Pullman Car Company neither owned nor operated any line of railroad. Its cars were moved by railway carriers under contracts, yet it was not regarded as violative of any federal restriction that its property should be regarded as a unit plant, with a unit value, and the value of its property in Pennsylvania assessed in the proportion that the mileage of the roads over which its cars ran in that state bore to the total mileage covered by its entire business."

It is objected that the board in reaching the true value in money of the property or capital of appellants considered or was affected by the good will of the company, and the profit which grows out of use, management, and location. But what is value? The value of a piece of property is what it will bring in exchange, *i. e.*, "power in exchange." Any thing, therefore, that increases the power of property in

exchange, whether good will, reputation, unity, or use, increases its "value." The proposition that the entire property of a plant or corporation may, by reason of good-will, careful administration, location, or use, have greater power in exchange than if these conditions were otherwise, may be readily admitted. But the result is none the less the *value* of the property because these elements contribute to it, as they do more or less to the value of all property assessed for taxation.

Besides, upon what principle should an assessor or a board of assessors seek the value of property? Not necessarily in accordance with this or that definition of the word "value." He does not pursue the inquiry as a problem in economic terminology. He is to ascertain the true value in money of the property as a measure of the ability of the corporation to contribute to the support of government. The only question of importance, therefore, is, what is the true value in money of the property of the corporation: not its intrinsic value taken piece by piece, but its value as a whole, in the place, at the time and under the circumstances in which it is found: in other words, what is the tax capacity of the corporation by reason of its possession of that property? This is the meaning of the word value in the science of taxation, and this is the theory upon which the valuation of the property of these corporations should be made. What will the property sell for in money? What amount of money is represented by or invested in the property?

It being shown that the property of an express or telegraph company has a value as a unit, by reason of its use, and the relation of its parts, which is its fair value for taxation, how are we to find this value?

The method provided by the law is as follows (Section 2778a, page 8, Exhibit Book):

"The said board shall proceed to ascertain and assess the

value of the property of said express, telegraph, and telephone companies in Ohio, and in determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

The construction given to this language of the law by the Supreme Court of Ohio, in the case of *State ex rel.* v. *Jones*, heretofore cited, is as follows (Exhibit Book, pp. 134, 135):

"The board, in determining the value of the company's property in this state for taxation, is not required to fix the value of such property upon the principle that the value of the entire property of the company shall be deemed the same as the value of its entire capital stock, thus making the respective values equivalents of each other. But, taking the market value of the capital stock as a datum, the board is to be only guided thereby in ascertaining the true value in money of the company's property in this state. The statute does not bind the board to find the value of the enitre property of the company equal to that of the entire capital stock."

Our contention is not that the property of the company is identical with its capital stock, or exactly equivalent in value. But it is that the value of the capital stock may be considered by the board as a fair guide to the value of the whole capital or property of the corporation, taken as a unit; and that when there is a substantial divergence between the value of the capital stock and that of the entire plant of the concern, it is due to exceptional circumstances, and the board

is authorized to give due weight to such exceptional circumstances in ascertaining the value of the entire property for taxation.

The selling or actual value of the capital stock of a company is generally a fair measure of the value of the entire property of the company as a unit. Each share of capital stock represents the contribution of its holder to the corporate property, and the sum of all of such contributions represents the entire capital invested. If the capital thus invested has increased in value as a result of its use and management, or for any other reason, that fact will raise the selling value or actual value of the shares of capital stock and is so much additional property or capital value; and on the same principle, a decrease of the value of the corporate plant, or of the property as a unit, will show itself in the diminished selling value of the capital stock. As the Supreme Court of Ohio said in the case of *State ex rel.* v. *Jones*, on page 136 of the Exhibit Book:

"But the property of a corporation may be regarded in the aggregate, as a unit, an entirety, as a plant designed for a specific object; and its value may be estimated not in parts, but taken as a whole. If the market value—perhaps the closest approximation to the true value in money—of the corporate property as a whole, were inquired into, the market value of the capital stock would become a controlling factor in fixing the value of the property. Should all the stockholders unite to sell the corporate plant as an entirety, they would not be inclined to sell it for less than the market value of the aggregate shares of the capital stock. Besides, while the amount of the capital stock may be limited by the charter and the laws governing it, the real and personal property of the corporation may be constantly augmented, and may keep pace with any increase in the value of the capital stock. The market value of the capital stock, it is urged, has no necessary relation to the value of the tangible property of the corporation. But such is the well understood relation between the two that not only is the value of the capital stock

an essential factor in fixing the market value of the corporate plant, but the corporate capital or property has a reflex action on the value of the capital stock. 'Shares in a corcorporation,' says Mr. Morawetz, 'represent fractional interests in the entire corporate concern, and their value necessarily depends upon the real capital, which the company owns. The whole and the sum of its parts must be equal.' Priv. Corp, sec. 288."

B. How Shall the Amount of Property in Ohio be Apportioned?

Having thus arrived at the true value in money of the corporate plant as a unit, how shall the portion of it used in Ohio be fairly determined? In the case of a telegraph company, the proportion which the mileage in Ohio bears to the mileage of the whole company, represents a fair proportion of the capital used in Ohio; and in the case of an express company, the proportionate length of the routes traversed by the company in Ohio to the entire routes traversed by the company, represents the fair proportion of the corporate capital or property used in Ohio. There may be exceptional circumstances, such as the existence of a large amount of real estate or some other specified property at the home office, which increases the proportion of the entire property to be found in that state, and decreases the proportion to be found in all other states. But this fact or facts should be brought to the attention of the board, and they are authorized to make due allowance for it, and it will be presumed that they did make full allowance for it.

It is thus seen that there is no tax laid on the property outside of the state, but such property is merely brought to the attention of the board for the purpose of aiding it in arriving at the value of the property as a whole in order to reach the value of the portion of the property used in the state. It is clear, also, that it is not the profits of the business that are being taxed; the profits of the business

are not a subject of inquiry. The profitableness of the use of the property may contribute to the value of the property for taxation, but the profits themselves are not taxed; they are not even known to the board.

It has been decided by the courts over and over again, that this method of valuing property is a fair one; that it constitutes a *bona fide* valuation of property for taxation; that it is, in effect as well as in name, a property tax; that it is not a tax on the business, or the earnings or the profits of the companies, but on their property; that the property of these corporations may be valued as a unit upon the basis of the value of their capital stock, and other evidence, and that the proportion of the entire valuation thus made, belonging to any one state, may be estimated on the mileage basis as above described.

In the case of *State ex rel.* v. *Jones, Auditor*, 51 Ohio St. 492, p. 122 of the Exhibit Book herein, the Supreme Court of Ohio says, in considering this law (p. 136):

"If by reason of the good will of the concern, or the skill, experience, and energy with which its business is conducted, the market value of the capital stock is largely increased, whereby the value of the tangible property of the corporation, considered as an entire plant, acquires a greater market value than it would otherwise have had, it can not properly be said not to be its true value in money within the meaning of the Constitution, because good will and other elements indirectly entered into its value. The market value of property is what it will bring when sold as such property is ordinarily sold in the community where it is situated; and the fact that it is its market can not be questioned because attributed somewhat to good will, franchise, skillful management of the property, or any other legitimate agency.

"It will, we think, be conceded that the earning capacity of real estate owned by individuals may be considered in fixing its value for taxation. Take an office building on a prominent street in one of our large cities. It will not be doubted that by care in the selection of tenants, and in the

preservation of the reputation of the building, by superior elevator service, by vigilance in guarding and protecting the property, by the exercise of skill and knowledge in the general management of the premises, a good will of the establishment will be promoted, which will tend to an extra increase in the earning capacity and value of the building. For the purpose of taxation it would be none the less the true value in money of the building, because contributed to by the operative causes that gave rise to the good will. We discover no satisfactory reason why the same rule should not apply to the valuation of corporate property—why the selling value of the capital stock, as affected by the good will of the business, should be excluded from the consideration of the board of appraisers and assessors under the Nichols law, charged with the valuation of corporate property in this state, especially as the capital stock, when paid up, practically represents at least an equal value of the corporate property."

The Circuit Court of Appeals, in deciding these cases, said (Exhibit Book, p. 113):

"The tax imposed is not a license tax, nor a tax on the business or occupation, nor on the transportation of property through the state, nor from points within the state to points in other states, nor from points in other states to points within the state. It purports to provide for a tax upon property within the State of Ohio. Though this property is employed very largely in the business of inter-state commerce, yet that does not exempt it from liability to taxation as all other property within the jurisdiction of Ohio. This proposition is too well settled to need argument.

Delaware Railroad Tax, 18 Wall. 232.

Western Union Tel. Co. v. *Massachusetts*, 125 U. S. 530–549.

LeLoup v. *Mobile*, 127 U. S. 640–649.

Pullman Car Co. v. *Penn.*, 141 U. S. 18–23.

"Neither does the fact that the property of the express companies was valued as a unit profit-producing plant violate any federal restriction upon the taxing power of a state within which a part of that plant is found. The value of

property depends in a large degree upon the use to which it is put. If a railroad may be valued as a unit, rather than as a given number of acres of land, plus so many tons of rail and so many thousand ties and a certain number of depots, shops, etc., there is no sufficient reason why the property of an express company should not be treated as a unit plant. If the State of Ohio has a right to tax the property within the state, and to assess it at its true cash value, there is no federal restriction which will prevent such property from being assessed at the value which it has, as used, and by reason of its use.

Pittsburg, etc., R. R. v. *Backus*, 154 U. S. 431.
Western Union Tel. Co. v. *Mass.*, 125 U. S. 530.
Pullman Car Co. v. *Penn.*, 141 U. S. 18."

In the *State Railroad Tax Cases*, 92 U. S. 575, this Court was considering a law of Illinois which purported to tax a railroad company on its entire capital stock and franchise, over and above the assessed value of the tangible property of said company. As the court said, p. 601:

"The theory of the system is manifestly to treat the railroad track, its rolling stock, its franchise and its capital, as a unit for taxation, and to distribute the assessed value of this unit according as the length of the road in each county, city and town bears to the whole length of the road."

The court, after speaking of the tangible real property and the tangible personal property, says (p. 602):

"It is obvious, however, that while a fair assessment under these two descriptions of property will include all the visible or tangible property of the corporation, it may or may not include all its wealth. There may be other property of a class not visible or tangible which ought to respond to taxation, and which the state has a right to subject to taxation. Thus it may occur, as in fact is claimed by one of these companies, that, being insolvent, and its earnings not being sufficient to pay any thing beyond its necessary expenses for operating the road and its repairs, this tangible property represents more than the real wealth of the company and its

property. While, on the other hand, another one of these companies is so rich that, after paying its expenses and interest on a large amount of debt, it declares large dividends; and this interest and these dividends, when looked to in reference to what is called the tangible property, show that there is here another element of wealth which ought to pay its share of the taxes."

And the court further says (p. 605):

"It is, therefore, obvious that, when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock."

On p. 608 the court says:

"It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised, than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole."

These statements by this Court seem to us to settle the correctness of the method of valuation and apportionment which have been adopted by the legislature of Ohio, for valuing corporate property, tangible and intangible, thereby subjecting to its contribution to governmental support the entire wealth of the corporation to be found in the state.

In the case of the *W. U. Tel. Co.* v. *Massachusetts*, 125 U. S. 530, this Court was considering a law of the State of Massachusetts, which levied a tax upon the corporate property of telegraph and other companies, upon a valuation made as follows: the market value of the entire capital stock of the company was determined; then the proportion which the length of the lines of the company within the state bore to the length of the entire lines of the company, was taken

as the proportion of the capital of the company which might be properly assigned to the State of Massachusetts. Upon this valuation, a property tax was placed. Of this tax the court said (p. 552):

"The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that state to their entire length throughout the whole country, is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by Section 5263 of the Revised Statutes, *or by the commerce clause of the constitution.*"

Even if the tax in the cases at bar were a tax on the proportion of the *capital stock* of the telegraph and express companies, represented by the proportion which the length of their lines or routes within the state bears to the entire length of such lines or routes, such a tax, under the authority of the case just quoted, would not be an interference with inter-state commerce. Both such a law, and the law actually in force in Ohio, provide in effect for the taxation of the *property* of the companies to which they apply.

In the case of *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, the syllabus is as follows:

"A statute of a state, imposing a tax on the capital stock of all corporations engaged in the transportation of freight or passengers within the state, under which a corporation of another state, engaged in running railroad cars into, through, and out of the state, and having at all times a large number of such cars within the state, is taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the state bears to the whole number of miles in this

and other states over which its cars are run, does not, as applied to such a corporation, violate the clause of the Constitution of the United States granting to Congress the power to regulate commerce among the several states."

The court says, p. 26:

"The mode which the State of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that state, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles in that and other states over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more.

"The validity of this mode of apportioning such a tax is sustained by several decisions of this Court, in cases which came up from the Circuit Courts of the United States, and in which, therefore, the jurisdiction of this Court extended, to the determination of the whole case, and was not limited, as upon writs of error to the state courts, to questions under the Constitution and laws of the United States."

Citing—

State Railroad Tax Cases, 92 U. S. 575.
W. U. Tel. Co. v. *Mass.*, 125 U. S. 530.
Marye v. *B. & O. R. R.*, 127 U. S. 117.

We regard the cases of the *C. C. C. & St. L. R. R.* v. *Backus*, and the *P. C. C. & St. L. R. R.* v. *Backus*, 154 U. S. 421 *et seq.*, as conclusive on this subject. The cases named grew out of the law in the State of Indiana, which provided that the property of railroads passing through that state should be valued as a unit, and that in so doing the board should consider the value of the capital stock of such roads, and that of the entire value of each road as so ascertained, the proportion should be assigned to the state which was

represented by the proportion which the mileage in that state bore to the entire mileage of the road. Such was the procedure adopted by the board of appraisers, and it was that method of procedure that was before the court for its adjudication. Upon the inauguration of this system, the value of the P. C. C. & St. L. R. R. for taxation was raised from eight to twenty-two million dollars. This law was held by this Court to be in conformity to the Federal Constitution in every respect.

With reference to the claim that the law interfered with inter-state commerce by placing a fictitious value upon the property of the company, this Court said, in the case of *C. C. C. & St. L. R. R.* v. *Backus*, 154 U. S. 445–447:

"It has been again and again said by this Court that while no state could impose any tax or burden upon the privilege of doing the business of inter-state commerce, yet it had the unquestioned right to place a property tax on the instrumentalities engaged in such commerce. See, among many other cases, *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18."

"The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put. In the nature of things it is practically impossible—at least in respect to railroad property—to divide its value, and determine how much is caused by one use to which it is put and how much by another. Take the case before us; it is impossible to disintegrate the value of that portion of the road within Indiana and determine how much

of that value springs from its use in doing inter-state business, and how much from its use in doing business wholly within the state. An attempt to do so would be entering upon a mere field of uncertainty and speculation. And because of this fact it is something which an assessing board is not required to attempt. Take for illustration property whose sole use is for purposes of inter-state commerce, such as a bridge over the Ohio, between the States of Kentucky and Ohio. From that springs its entire value. Can it be that it is on that account entirely relieved from the burden of state taxation? Will it be said that the taxation must be based simply on the cost when was it ever held that the cost of a thing is the test of its value? Suppose there be two bridges over the Ohio, the cost of the construction of each being the same, one between Cincinnati and Newport, and another twenty miles below and where there is nothing but a small village on either shore. The value of one will, manifestly, be greater than that of the other, and that excess of value will spring solely from the larger use of the one than of the other. Must an assessing board in either state, assessing that portion of the bridge within the state for purposes of taxation, eliminate all of the value which flows from the use, and place the assessment at only the sum remaining? It is a practical impossibility. Either the property must be declared wholly exempt from state taxation or taxed at its value, irrespective of the causes and uses which have brought about such value. And the uniform ruling of this Court, a ruling demanded by the harmonious relations between the states and the national government, has affirmed that the full discharge of no duty intrusted to the latter restrains the former from the exercise of the power of equal taxation upon all private property within its territorial limits. All that has been decided is that, beyond the taxation of property, according to the rule of ordinary property taxation, no state shall attempt to impose the added burden of a license or other tax for the privilege of using, constructing or operating any bridge, or other instrumentality of inter-state commerce, or for the carrying on of such commerce. It is enough for the state that it finds within its borders property which is of a certain value. What has caused that value is immaterial. It

is protected by state laws, and the rule of all property taxation is the rule of value, and by that rule property engaged in inter-state commerce is controlled the same as property engaged in commerce within the state. Neither is this an attempt to do by indirection what can not be done directly—that is, to cast a burden on inter-state commerce. It comes rather within that large class of state action, like certain police restraints, which, while indirectly affecting, can not be considered as a regulation of inter-state commerce or a direct burden upon its free exercise. We answer this question, therefore, in the negative."

In the case of *P. C. C. & St. L. R. R.* v. *Backus*, 154 U. S., on p. 429, the court says:

"In *Franklyn County* v. *Nashville, Chattanooga, &c., Railway*, 12 Lea, 521, 539, the Supreme Court of Tennessee, in a well considered opinion, which was quoted with approval by this court in *Columbus Southern Railway* v. *Wright*, 151 U. S. 470, 479, thus referred to the means of ascertaining the value of a railroad track:

"'The value of the railway at any given time is not the original cost, nor, *a fortiori*, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value can not be determined by ascertaining the value of the land included in the railway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails, and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock. No local estimate of the fraction in one county of a railroad track running through several counties can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road.'"

In answer to the contention that the law levied a tax upon the property of the companies outside of the state, the court says, p. 430:

"When a railroad runs through two states, it is, as seen, helpful in determining the value of that part within one state to know the value of the road as a whole. It is not stated in this statute that when the value of a road running in two states is ascertained the value of that within the State of Indiana shall be determined absolutely by dividing the gross value upon a mileage basis, but only that the total amount of stock and indebtedness shall be presented for consideration by the state board. Nevertheless, it is ordinarily true that when a railroad consists of a single continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this Court several times as eminently fair."

In the case of *C. C. C. & St. L. R. R.* v. *Backus*, 154 U. S., on pp. 444–445, the court says:

"Now, when a road runs into two states, each state is entitled to consider as within its territorial jurisdiction and subject to the burdens of its taxes what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road. It is not bound to enter upon a disintegration of values and attempt to extract from the total value of the entire property that which would exist if the miles of road within the state were operated separately. Take the case of a railroad running from Columbus, Ohio, to Indianapolis, Indiana. Whatever of value there may be resulting from the continuous operation of that road is partly attributable to the portion of the road in Indiana and partly to that in Ohio, and each state has an equal right to reach after a just proportion of that value, and subject it to its taxing processes. The question is, how can equity be secured between the states, and to that a division of the value of the entire property upon the mileage basis is the legitimate answer. Taking a mileage share of that in Indiana is not taxing property outside of the state."

Every important question raised in the cases at bar was

decided in these Indiana Tax cases, and decided in favor of the state and the validity of the law, and their reasoning and authority apply equally to the cases at bar.

Counsel for appellants, while admitting the applicability of the above principles to railroad and telegraph companies, makes much of the contention that there is no unity in the property of an express company, and no reason, therefore, for taxing its property in a different manner from that of individuals. He has printed upon the cover of his brief a portion of a sentence from the case of *Pacific Express Co.* v. *Seibert*, 142 U. S. 354, to the effect that "express companies have no tangible property of any consequence subject to taxation under the general laws."

To this contention we make answer: *First*, *tangible* property is not the only form of personal property owned by express companies and used in their business; the great mass of personal property in the country is *intangible* personal property. *Second*, the validity of the method of valuation under discussion here does not depend upon the physical continuity of the property, such as the unity of a telegraph line or the roadbed of a railroad. The unity requisite to invoke this method is the unity of use and management, which exists in the case of an express company just as certainly as in the case of a railroad company.

We have already referred to this subject in the case of the *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18. In that case the only property of the company in the State of Pennsylvania was a number of palace cars. They were not connected in any way, and they were the only property of the company in the state; they were not even in the state permanently, but passed through it. The tax, although levied in terms on the stock of the corporation, was held by the court to be in effect a tax on its property: "The tax on the capital stock of the corporation on account of its

property within the state, is in substance and effect a tax on that property."

The rationale of that system was that the proportion of the wealth or property of the Pullman Car Company used in its business in the State of Pennsylvania, was fairly determined by taking that proportion of the capital stock which was equal to the proportion of the mileage in Pennsylvania, as compared with the whole mileage of the company. The only tangible property of the company consisted of the palace cars used in the state. Their separate value was not inquired into. It is perfectly evident that they did not constitute a unit plant physically, and it does not appear that their value as separate cars bore any direct relation to the valuation which was made by the state board. But the court held that the method adopted was a fair method of valuing the portion of the entire property and capital of the company used in the State of Pennsylvania, at the value which it had by reason of its use.

In the case of the *W. U. Tel. Co.* v. *Massachusetts*, heretofore cited, the validity of the method adopted was sustained, not merely because the telegraph line of the company was a physical unit. The telegraph line was not the only property and capital owned and used by the company in the State of Massachusetts. The increase in the valuation for taxation of this property, applied not only to the telegraph line, which was a physical unit, but also to the other items of property, tangible and intangible. The principle of that case was that the method adopted by the state was a fair valuation of the proportion of the property or capital of the company used in the State of Massachusetts. This was held to be in effect a tax on the property of the corporation.

So in the case of the railroad companies in Indiana. Their road-beds were physical units, it is true, but their rolling stock and other personal property consisted of separate items,

and yet the increase in the valuation by reason of the use of the property was applied to all this personal property, as well as to the road-bed. In these cases, as well as the others cited, the system was not sustained as being a valuation of the tangible property alone, but as being a fair valuation of the proportion of the entire wealth of the company, tangible and intangible, in use in the State of Indiana.

And so it is in the case of express companies. The inquiry is as to the proportion of the aggregate wealth of each company in use in the State of Ohio, tangible and intangible. For purposes of taxation, personal property, tangible or intangible, does not follow the *situs* of its owner, but may be taxed in the state where it is in use. This was expressly decided in the case of *Pullman Palace Car Co.* v. *Penn.*, already cited. A state may tax not only the tangible property of a corporation, that property which is physically within its borders, but also its proportion of the intangible property or capital in use within its borders.

Counsel for appellees states repeatedly in his briefs that "the circuit judge reached the conclusion that this appraisement was not an appraisement of the property of the company in Ohio at all; that taxation by such a measure of value is an income tax, and not a property *ad valorem* tax" (p. 2, W. U. brief). We call the court's attention to the fact that the opinion of the circuit judge referred to, and from which these quotations are made, was expressly reversed by that judge after the decision of the Supreme Court of Ohio, and that the circuit judge said, in his final opinion in the case (Ex. Bk., p. 99):

"What the board of assessors really did was to treat as the total taxable personal property of the company every element, except real estate, which contributes to earn dividends, including tangible personal property, franchises, goodwill, business skill and judgment, and railway contracts and arrangements.

"The question is, therefore, whether a method of valuation like the foregoing is permissible under the construction which the Supreme Court of Ohio has placed on the Nichols law, in upholding its constitutional validity. I think that it is."

Counsel for appellants says in his brief for the W. U. Telegraph Company, p. 2, that the valuation of the property of the telegraph companies, made by the board, was based upon a certain mathematical calculation, which he then proceeds to describe. This "mathematical calculation" is purely an inference of counsel, and does not appear of record. But counsel goes on to say: "There are two errors in this calculation; the first in assuming that the value of the capital stock, especially the market value, is the same thing as the value of the assets of the company; and the second, in assuming that the value of the lines in Ohio is the proportion of the value of all the company's lines, which the lines in Ohio bear, in mileage, to all of the lines."

To this comprehensive contention, a complete answer is found in the recent case decided by this court, *Western Union Telegraph Company* v. *Taggart*, 163 U. S. 1. A portion of the syllabus of that case is as follows:

"A statute of a state requiring a telegraph company to pay a tax upon its property within the state, valued at such a proportion of the whole value of its capital stock as the length of its lines within the state bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the state, is constitutional and valid."

We regard this case as conclusive of the validity and justice of the method of valuation in question in the case at bar. This Court in this case reviews, and affirms the cases of *Western Union Telegraph Company* v. *Mass.*, 125 U. S., and *Railroad Co.* v. *Backus*, 154 U. S. The valuation of the property of the Western Union Telegraph Company in Indiana, which was upheld by this Court as being

a valid and just valuation, was $2,297,652; while the valuation of the property of that company in Ohio, which is attacked in the cases at bar, was only $2,011,076, or nearly $300,000 less. Yet it is notorious that the lines of the company in Ohio, by reason of greater mileage, population and business, are really more valuable than the lines of the company in Indiana.

The pleadings and arguments in the case of *Western Union Telegraph Company* v. *Taggart*, 163 U. S. 1, state in the strongest possible way, all the objections made in the case at bar to the Ohio law. The laws of the two states are almost identical, the difference, if any, being in favor of the Ohio law. But this court upheld the law, and the valuation made under it. The court says, pp. 14 and 15:

"The principal grounds upon which the plaintiff contend that the statute of Indiana of March 6, 1893, c. 171, is unconstitutional, and the valuation and assessment of the plaintiff's property under it is invalid, are that they necessarily include a taxation of franchises granted to the plaintiff by the United States, as well as of the plaintiff's property outside of the State of Indiana, neither of which was subject to taxation in that state; and also, by taking the market value of shares of the plaintiff's stock, in fixing the valuation of the entire property of the plaintiff, and by apportioning that valuation according to the proportion thereof within the State of Indiana, of all the plaintiff's telegraph lines every-where, adopted an arbitrary rule, and imposed an unlawful burden upon interstate commerce.

"But in each of these respects the case presented by this record appears to us to be governed by previous decisions of this Court. The argument for the plaintiffs' in error, in effect, if not in express words, invites the court to modify or to overrule those decisions."

And the court says, on p. 18:

"Those decisions clearly establish that a statute of a state, requiring a telegraph company to pay a tax upon its

property within the state, valued at such a proportion of the whole value of its capital stock as the length of its lines within the state bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the state, is constitutional and valid, notwithstanding that nothing is in terms directed to be deducted from the valuation, either for the value of its franchise from the United States, or for the value of its real estate and machinery situated and taxed in other states; unless there is something more showing that the system of taxation adopted is oppressive and unconstitutional."

And the court says on page 30:

"The allegation that 'the attempted and pretended valuation of complainant's said property by said state board of tax commissioners, in manner aforesaid, necessarily includes, and does in fact include, values which are no part of the true cash value of the property of complainant in Indiana,' is but equivalent to an assertion that the decision of the tax commissioners upon the question of fact committed by the statute to their determination was erroneous. As said by this Court in *Pittsburgh, etc., Railway* v. *Backus*, above cited, 'Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact; and if such determination comes into inquiry before the courts, it can not be overthrown by evidence going only to show that the fact was otherwise than as so found and determined.' 154 U. S. 434, 435."

We claim that the State of Ohio has the right to tax the property of these companies, tangible and intangible, in use within its borders; it has a right to consider the additional value which all these items of property have by reason of their use as a part of a system, as a part of a great express or telegraph business; and it has a right to be guided in the determination of this value by the actual value of the capital stock of the company, even if the result thus attained bears no relation to the value of the separate items of tangible

property to be found within the state, and these rights have been fully recognized by the decisions of this Court.

V.

IF THE LAW IS CONSTITUTIONAL, THE COURT WILL NOT REVIEW THE ACTION OF THE BOARD THEREUNDER, UNLESS FRAUD IS CHARGED.

We have heretofore argued that the only question before this Court is as to the constitutionality of this law under the Federal Constitution, and that if the court finds the law to be constitutional, it will not go into the question of valuation, on the ground of a lack of jurisdiction. In other words, the appellants ought not to secure the judgment of this Court upon a difference of opinion between them and the state board, by merely asserting in their bills that the law is unconstitutional. But even if the court had jurisdiction, and would, so far as that ground is concerned, go into the question of such difference of opinion, the bills do not present a case calling for relief. It is not charged in the bills that the valuations made are the result of fraud on the part of the board, or even gross carelessness. In the absence of such an allegation, the question stands merely as a difference of opinion between the companies and the board, and this Court will not review the action of the board, whose judgment is made final on that subject.

The Circuit Court below, in its opinion dismissing the bills in the case at bar, said (p. 100, Ex. Bk.):

"The board of assessors seems to me to have kept well within this construction of the law. Complainant can only secure the equitable relief it seeks by showing that the excessive valuation claimed arose either from fraud of the assessing officers, or from adopting an unlawful rule of appraisement. Fraud is not charged, and as we have seen, no unlawfulness appears in the mode of appraisement. Mere

errors of judgment in appraisement are not the subject of review here."

And the Circuit Court of Appeals said (p. 116, Exhibit Book):

"As in the case last cited (*P. C. C. & St. L. R. R.* v. *Backus*, 154 U. S.), it may be said 'that the most that can be made out of the bill is a complaint that the assessment is too high, because the board took into consideration property outside of the state, and gave to the property within the state a value partly deduced from that without the state.'

"But if it was lawful to value the whole plant, looking at it as a unit, and looking to the market value of the capital stock as a factor in the ascertainment of that total value, and that such a method does not contravene the Constitution or law of Ohio, then it would seem to follow, in the absence of specific charges of fraud, or of a departure from the method of appraisement indicated by the law, that a court of equity is without power to relieve against a mere excessive valuation. Clearly a court of equity will not, in the absence of fraud or violation of law, enjoin an assessment merely upon allegations of excessiveness."

In the case of *Wagoner* v. *Loomis*, 37 Ohio St. 571, the syllabus is as follows:

"As a general rule, the decisions of officers and tribunals specially created and charged, in tax laws, with the duty of valuing property for taxation and equalizing such valuations, are final and conclusive.

"Inequalities in the valuations, made under a valid law, of property for taxation do not constitute grounds for enjoining the tax in the absence of fraudulent discriminations by the agents and officers charged by the law with the duty of making such valuations."

In the *State R. R. Tax Cases*, 92 U. S. 613, the court says:

"It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor ir-

regularity of themselves give the right to an injunction in a court of equity."

And in the case of *Kelly* v. *Pittsburgh*, 104 U. S., on page 80, the court says:

"It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not, we can not here inquire. We have so often decided that we can not review and correct the errors and mistakes of the state tribunals on that subject, that it is only necessary to refer to those decisions without a re-statement of the argument on which they rest."

State R. R. Tax Cases, 92 U. S. 575.
Kennard v. *Louisiana*, Id. 480.
Davidson v. *New Orleans*, 96 Id. 97.
Kirtland v. *Hotchkiss*, 100 Id. 491.
Missouri v. *Lewis*, 101 Id. 22.
National Bank v. *Kimball*, 103 Id. 732.

In the recent decisions of this Court in *P. C. C. & St. L. Ry. Co.* v. *Backus*, 154 U. S. 421, and in *C. C. C. & St. L. Ry. Co.* v. *Backus*, Id. 439, this principle was affirmed. In those cases, the valuation of one railway was raised from eight and a half millions to over twenty-two and a half millions. The positive and uncontradicted testimony of those familiar with the value of the railway property placed it at eight and a half millions. No testimony was offered by the state officers to rebut this testimony of the railway company, and the same claim was made in that case that is made in the cases at bar, that the state officers made an excessive valuation, and misapplied the rules of law in making it; yet this Court held that there was no testimony offered that tended to impeach the valuation fixed by the state board, even although it was claimed that the valuation was practically confiscation. The syllabus to the case first mentioned says:

"The judgment of a state board empowered to fix a valuation for taxation can not be set aside by the testimony of witnesses that the valuation was other than that fixed by the board, where there is no evidence of fraud or of gross error in the system on which the valuations were made."

In the cases at bar there is no averment of fraud to justify this Court in reviewing the action of the state board.

In the cases at bar, the law provides that the board shall value for taxation, the property in Ohio of the companies named. While stating the method of inquiry, it gives the board large discretion, in order that it may, under all circumstances, arrive at the true value in money of the property under consideration. The companies have repeated hearings before the board, and all the special circumstances affecting the value of the property may be presumed to have been before the board; it was not required by the law to place the value of the property exactly in accordance with the value of the capital stock on a mileage basis, but, with these facts as data for its use, it was to value the property of the companies in the State of Ohio at its true value in money. The board has done so, and we contend that the decisions of this Court are conclusive to the effect that such valuation is final, and that the courts will not disturb it, unless there be a charge of fraud or gross recklessness. There is no such charge in these cases, and we contend that the appellants are not entitled to the relief they seek.

The fallacy underlying the claim of appellants for relief in their attack on the law and the action of the board, and also underlying the argument of their counsel, is manifest when we consider that if the valuation of appellants' property had been made according to their judgment and not according to that of the board, these cases would not be in court.

Neither the law nor the action of the board would be questioned. It is valuation, and not property, that is the contention. Appellants concede they have property in the State of Ohio, and that it is taxable at its true value in money. This is all that the law attempts to tax. It is the amount of this property which the board is to ascertain and fix at its true value in money. This it has done in good faith. Appellants in effect say, "no, you have valued this property too high. In order to reach such a valuation, you must have included property not in Ohio, although your official action expressly negatives any such claim." Who is to decide these questions? Who is to determine what property appellants have and use in Ohio, and what its true value in money is for the purposes of taxation? The appellants? This Court? Or the board created by law to decide these very questions?

Appellants say our entire property in Ohio consists of safes, wagons, horses, and other chattels, and we have none other. This the valuing board denies. Who decides? Is the tax-payer the final judge of what property he has for taxation and its valuation? Are assessing boards bound by the returns and statements of the tax-payers? Appellants claim they are, hence these suits. We claim that the assessing board, in the absence of fraud, is the final judge of what property appellants own and use in Ohio and of its valuation for taxation. If the board is not, who is?

Suppose this Court should differ with the valuation of the board and enjoin its action, what then? The property must be ascertained and valued, and the same board must do it. These appellants concede the amount of their capital stock. They do not deny its value as a whole. They do not deny that such capital stock at that value is their property, and is essential to carry on their business in Ohio and elsewhere. Who is to determine the portion of that capital used in Ohio, the proportion properly taxable in that state?

It is idle to claim that a tax on that capital is an inter-

ference with inter-state commerce, or is in any way the taxation of property not subject to the taxing power of the State of Ohio.

For these reasons, we submit that the judgments of the court below were in all respects correct, and should be affirmed.

VI.

APPELLANTS ARE NOT ENTITLED TO THE INJUNCTIONS PRAYED FOR AGAINST THE BOARD OR THE STATE AUDITORS.

We submit that in addition to the reasons above given, the demurrrers should be sustained on the ground that an injunction will not lie against the state board or the state auditor.

The cases under the law of 1893 and for the taxes of that year, Nos. 337 and 352, are entered against the state board of appraisers and assessors to enjoin them from certifying to the county auditors their valuations.

The cases under the law of 1894 and for the taxes of that year, Nos. 338, 339, 340, and 405, were entered in the first instance against the state auditor, a member and president of the state board, to enjoin him from certifying to the county auditors the valuations made by the state board. The injunctions were issued too late, as the valuations had been certified, and by amendment, all the county auditors were made parties jointly with each other, and with the state auditor, and an injunction was asked against them, to enjoin them from apportioning the valuations certified to them, among the taxing districts of their respective counties, and from placing the same on the duplicate.

The cases for the taxes of the year 1895, Nos. 398, 399, 400, 401, were entered against the state auditor, a member

and president of the board, to enjoin him from certifying to the county auditors the valuation made by the state board.

The cases in 1893 were, therefore, directed against a judicial board which was appointed by law to value for taxation the property of these companies. The cases in 1894 were directed against the state auditor, a member and president of the state board. This was also true of the 1895 cases. The function of the state auditor in this matter was to do, under the law of 1894, what the board had done itself under the law of 1893, the original law, viz., transmit to the county auditors the valuations made by the board. His action in this regard did not pertain to his office as auditor, but was his action as agent of the board, and was therefore, in effect, the action of the board itself.

Our contention is that no injunction could be issued against a *quasi* judicial board of appraisers for any purpose; that an injunction could only issue to enjoin the collection or levy of a tax, and that there is no precedent for an injunction against the valuation of property for taxation.

In the 1894 cases, as we have said, the injunction against the board was obtained too late to have any effect. The bills, therefore, attempted to make all the county auditors jointly parties to the original action, and enjoin them separately from placing the valuation on the tax duplicate. This, we contend, was a misjoinder, and the demurrer to the bills should be sustained for that reason. Let us first consider this contention.

CAUSES OF ACTION AGAINST THE STATE AUDITOR HAVE BEEN IMPROPERLY JOINED WITH CAUSES OF ACTION AGAINST COUNTY AUDITORS IN SAID SUITS, AND SAID DEFENDANTS HAVE BEEN IMPROPERLY JOINED THEREIN.

We submit, *first*, that the action against the county auditors was in all respects a new suit, or a series of new suits, and should have been so filed, and not as an amend-

ment to a totally disconnected action. In the nature of things, there can be no joint relief against a state auditor and county auditors in the matter of the law in question. they take no joint action in the execution of the law. The official action of one does not commence until the action of the other is terminated, and they could not be enjoined together, because they do not act together. The amendments confess that the relief against the state auditor had failed; that he had acted, and that an injunction against him was of no avail; in other words, that the action instituted by the appellants was useless, and that other relief against other parties must be obtained. Thereupon appellants sought to state in the same case a new cause of action against new and wholly distinct parties, and asked for distinct and separate relief. This, we claim, is a violation of all the rules of pleading applicable to the subject.

Second. The county auditors can not be joined with each other in the same suit. The cause of action against each one of them is separate and distinct from the cause of action against every other one; the relief sought from each is separate and distinct from the relief sought from every other one. They do no act in common which is sought to be enjoined; they have no joint or common interest which is sought to be settled; each county auditor is responsible for his own tax duplicate and no other. The action against any one of them does not, in the slightest degree affect any other one, and there is not the slightest community of interest between them to justify their joinder in one action. The cause of action, the amount involved, the relief sought, and the person against whom the relief is sought in one case, are totally distinct and separate from those in every other case.

Even the broad and lenient rules of equity pleading require *some* connecting link of interest between parties who are joined, but in the cases under discussion there is no such connection.

In the case of *Walter* v. *R. R. Co.*, 147 U. S. 370, suit was brought to enjoin the treasurer and sheriff of four counties from collecting a tax on the property of the railroad company lying in those counties. The court said, p. 372:

"Under these circumstances, it is entirely clear that, had these taxes been paid under protest and the plaintiff had sought to recover them back, it would have been obliged to bring separate actions in each county. As the amount recoverable from each county would be different, no joint judgment could possibly be rendered. So, had a bill for injunction been filed in a state court, and the practice had permitted, as in some states, a chancery subpœna to be served in any county of the state, these defendants could not have been joined in one bill, but a separate bill would have had to be filed in each county."

AN INJUNCTION WILL NOT LIE AGAINST THE BOARD.

Directing our attention now to the main inquiry under this head, we deny that an injunction will lie against the judicial boards charged with the duty of valuing the property of these companies for taxation. The right to an injunction in this case is claimed first under the statute of Ohio, Sections 5848 and 5849, which are as follows:

"Section 5848. Courts of common pleas and superior courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof; but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected."

"Section 5849. Actions to enjoin the illegal levy of taxes and assessments must be brought against the corporation or person for whose use and benefit the levy is made; and if the levy would go upon the county duplicate, the county auditor must be joined in the action."

The appellees contend that the statute above quoted does not justify an injunction against the state board. The action of the state board is not the levy or the collection of the tax, and it can not be enjoined. The levy of a tax is the act of the proper officer by which the tax finally becomes a legal charge upon the person taxed. Up to the time of placing upon the duplicate the sum to be charged against the property, the tax is not "levied." It is therefore this act of the auditor in placing the tax upon the duplicate, which is the final and conclusive step that constitutes the levy. The valuation of the property is a preliminary step, and is not a part of the levy, and it can not be enjoined by authority of this statute.

In the case of *Jones* v. *Davis*, 35 Ohio St. 479, the court says:

"The statute (75 Ohio L. 778) provides that the Courts of Common Pleas and Superior Courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either. The addition of an item of property to the return of the tax-payer by a board of equalization, with a direction to the auditor to carry the same upon the duplicate, and to assess against it the fixed rate for state, county, and other purposes, does not of itself constitute the levy. Nor does the mere ascertainment of the rate of assessment by those whose duty it is to determine the rate to be levied. The process is not complete until the valuation of the property, with the sum to be charged against it, is carried upon the duplicate."

In the case of *State ex rel.* v. *Jones*, 51 Ohio St. 492, p. 122 of Exhibit Book, the court says, pp. 139–140:

"By Section 5848 of the Revised Statutes, 'the Courts of Common Pleas and Superior Courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either.' And by Section 5849, in actions to enjoin the illegal levy of taxes and assessments, 'if the levy would go upon the county duplicate, the county auditor must be joined in the action.' In *Jones* v. *Davis*, 35 Ohio

St. 474, it was held by this Court, that the addition of an item of property to the return of the tax-payer, by a board of equalization, with a direction to the auditor to carry the same upon the duplicate, and to assess against it the fixed rate for state, county, and other purposes, does not of itself constitute the levy; nor does the mere ascertainment of the rate of assessment by those whose duty it is to determine the rate to be levied. The process is not complete until the valuation of the property, with the sum to be charged against it, is carried upon the duplicate.

"So that, in the case of an express company, after the board of appraisers and assessors has certified to the county auditor the amount proportioned to his county of the value of the company's property; and before the county auditor has apportioned the amount among the several taxing districts, and placed the same on the tax list to be assessed and collected as taxes are assessed and collected on other property, an injunction will lie in favor of the company, to enjoin the auditor from carrying such amount upon the duplicate, and thereby afford an opportunity to inquire into the legality of the assessment before a lien attaches and before the treasurer is warranted to make collection."

This is in effect a decision by the Supreme Court of Ohio, that an injunction will not lie under Revised Statutes, 5848, at any step before the action of the auditor, placing the amounts upon the duplicate. If appellants seek the remedy under the Ohio statute, they must be bound, even in the federal courts, by the limitations placed by the Supreme Court of Ohio upon that remedy.

Under the general equity jurisdiction of a federal court, an injunction will not lie to enjoin even the levy of a tax, but only its collection. And even to enjoin the collection of a tax, the mere illegality of the exaction is not a sufficient ground, but the case must be brought within some of the heads of equity jurisdiction, such as multiplicity of suits, or otherwise. This has been repeatedly decided by this Court. And such an injunction will not issue if there is an

adequate remedy at law, such as an appeal from the valuing board to some other board or tribunal, or a right to recover the taxes when paid under protest. The decisions of this Court on this subject will be referred to later.

But we contend that upon principle an injunction will not lie, either under the Ohio statutes or the general equity jurisdiction of the federal courts, against the valuing board in these cases.

If the appellants were injured by the valuation of the board under the law, they did not exhaust their remedies under that law, and have no ground of appeal to a court of equity. The law provides that at any time before the certification of the valuation to the county auditors, any person who considers himself aggrieved by the valuation, may make application to the board for a rehearing, and a correction of the assessment—an appeal, as it were, or a motion for a new trial. The record does not show that appellants made this "motion for a new trial" or applied for a correction.

Again, the provisions of Section 167 of the Revised Statutes apply to the correction of any error in the valuation. See law, Ex. Bk., p. 9, and *State ex rel.* v. *Jones*, Exhibit Book, p. 138. By this section the state auditor, or, in cases involving more than $100, a board composed of the Governor, Auditor, and Attorney-General, is empowered upon application, or of its own motion, to correct an assessment under the law, even if it has been certified to the county auditors. The record does not show that the appellants availed themselves of this remedy at law.

Here are two remedies at law, provided by the very law under discussion, and by R. S. 167, for relief against unjust assessments, and yet, by confession of the record, appellants did not avail themselves of these legal remedies. Instead of doing so, they go to a federal court of equity, and ask for an injunction against the action of a judicial body, en-

gaged in the preliminary step of valuing their property for taxation.

Why should the state board be enjoined from certifying their valuation to the county auditors? *Non constat* but that the state auditor, or the board authorized by Section 167, would correct the assessments before they were placed upon the duplicate by the county auditor. Can a plaintiff go into a court of equity for an injunction when he has ignored two different legal remedies provided for the very injury of which he complains?

But further, we submit that it is wrong in principle to enjoin the judicial action of a board of appraisers, whose duty is merely to value property for taxation. Their function is precisely that of a ward appraiser with reference to other property. And yet, would these corporations, or would individuals, be entitled to injunctions against ward assessors to enjoin them from making their returns to the county auditor? The action of this board, or of a ward assessor, is not final, and does not place any liability upon the tax-payer. The valuation made by the board may at any time before being placed on the tax duplicate, be changed by this or other officers, and this being the case, it seems clear that the remedy of injunction should not be applied to an action not final, which imposed no legal liability, and from which no injury will necessarily result to the complainant.

The act of the auditor in carrying the amount upon the duplicate is the levy; it is the final act which creates a liability, and attaches a lien, and under the Ohio statute, it may be enjoined. *But all which precedes it is judicial, and can not be enjoined.* The executive officer, the collector or the auditor, may be enjoined in executing an invalid tax law, but the judicial officers, to whom is confided the duty of valuing the property, can not be enjoined. Their action may be appealed from in a suit between the parties, *i. e.*, between the tax-payer and the state or the executive officers of the state, or on an

inquiry before a reviewing tribunal provided by law, but the judicial body itself can not be sued to modify or enjoin its action. This would be contrary to a principle which lies at the foundation of government.

In the case of *W. R. R. Co.* v. *Nolan*, 48 N. Y. 518, the court says:

"The assessors are *quasi* judicial officers, when acting within the sphere of their jurisdiction, and their assessments, when made, become judgments to be enforced by a warrant, in the nature of a special execution, to be issued by the supervisors of the county. The assessors are not subject to an action to review, modify, or reverse their judgments, nor to hold them to personal liability when acting within their jurisdiction. Their judgments can be reviewed by action, for fraud, mistake, or other cause, giving jurisdiction to courts of equity, but it is the parties affected by the judgment who must be brought into court to litigate, and not the judges.

"The public officers which the court has the power to restrain, when proceeding illegally under a claim of right, injuriously affecting the property or rights of a party, referred to by the chancellor in the case of *M. & H. Ry. Co.* v. *Artcher*, 6 Paige, 83, and other cases there cited, particularly referred to by the learned counsel for the plaintiff, are ministerial and not judicial officers. The process of injunction in a proper case for staying a judgment, goes against the parties and not against the tribunal or its judges."

This is the principle. If it is sought to restrain the collection of a tax based on the valuation made by this board, the action must be brought against the executive officers to whom is confided the duty of levying or collecting the tax, and not against the tribunal, the board of appraisers and assessors, whose judgment is assailed.

It has been decided by this Court again and again that the mere illegality of a tax is not a ground for injunction against the collection of the tax, but that the case must be brought within some of the recognized heads of equity juris-

diction, such as a multiplicity of suits, irreparable injury, etc. This interpretation of the general equity powers of the federal courts is not broader than the power under the Ohio statute; in fact, it is narrower.

Appellants have claimed that they were entitled to an injunction against the state board or the state auditor as the agent of the board, although that board is a judicial body, because, unless they can enjoin the whole valuation in one lump, they must enjoin each separate county auditor from placing the valuation certified to him upon the tax duplicate or must enjoin each county treasurer from collecting it, or must sue to recover back in each county. This alternative they call a "multiplicity of suits," which they allege as a ground for their action.

This court has never upheld an injunction against an assessor or board of assessors, or any *quasi* judicial board clothed with the duty of valuing property for taxation. What the Court has held in this matter is that ordinarily an injunction will not be allowed against even the *collection* of taxes; but that if there be some equitable ground, in addition to the illegality of the tax, such as multiplicity of suits, an injunction will lie, on that ground, against the *collection* of the tax. It has never held, and it is not correct in principle, that an injunction will lie on any ground or pretext whatever against the judicial action of a board of appraisers and assessors. Let us look at the cases cited in the course of this litigation, and in the brief of counsel for appellants, in support of the contention of appellants upon this question. The following are all of the cases cited in its support:

The *State R. R. Tax cases*, 92 U. S. 575, were suits against the tax *collectors* to enjoin the *collection* of the tax.

So in *Cummings* v. *National Bank*, 101 U. S. 153, the action was to enjoin the treasurer from *collecting* the tax. The court decided that the enforcement of the law would result in a number of suits by the stockholders against the bank,

etc., and that to prevent such a multiplicity of suits against it, the court would allow an injunction against the *collection* of the tax.

In the case of *Shelton* v. *Platt*, 139 U. S. 591, the suit was against the comptroller of the State of Tennessee, and the sheriff of the county of Hamilton in that state, to restrain the *collection* of a license tax.

The case of *Marshall* v. *Holmes*, 141 U. S. 589, was not a tax case at all, and is not pertinent.

The case of *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, was a suit against the officers authorized to collect the tax, and was to prevent them from collecting it.

These cases do not bear upon our contention at all. They hold that upon certain equitable grounds the collection of a tax may be enjoined. This we do not deny. Our claim is that the judicial action of a valuing board can not be enjoined, and not one of the cases cited even intimates that for any reason such action can be so enjoined. We have not been able to find any decided case which is at variance with our contention, and the doctrine of *R. R. Co.* v. *Nolan*, above quoted.

In addition to the fact that an injunction against the valuing board is contrary to principle, and is a dangerous precedent in the treatment of judicial bodies, there is also a practical inconvenience. A person who seeks to enjoin the collection of an illegal tax must first tender the amount which he admits to be due from him. This is a principle that will not be disputed. The reason of it is that no person should be allowed to enjoin the collection of taxes which are equitably due from him merely because there is added to the amount equitably due, the excess of which he complains. The effect of the injunctions against the state board in the cases at bar is to prevent the certification of the values of the property for taxation, and the whole process of taxation is stopped at that point. This preliminary step is not the

stage in the process of taxation where it is proper, on principle, to make a tender of taxes which are admitted to be due, because at that stage of the process it is not yet time to put on the duplicate even the admitted tax, and the auditor is not authorized to charge, or the treasurer to receive, any tax whatever from the appellants. The process of taxation as to the property of these appellants was stopped at the point where the auditor was prevented from receiving any valuation of their property, was prevented from placing them on his list or duplicate, and the work of the taxing machinery of the state was impeded to that extent.

As to the general question of the propriety of granting such injunctions against the state board, the presumption is always against enjoining the proceedings of the taxing power. The exigencies of government demand that the revenue of the state shall not be capriciously interfered with, and, generally, the only way to obtain relief from unjust taxation is to pay the tax under protest and sue to recover it back. Equity will not violate this principle except under certain circumstances. In the language of this Court in the case of *Dows* v. *Chicago*, 11 Wall. 108, 110:

"It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers upon whom the duty is devolved of collecting the taxes may derange the operations of government, and thereby cause serious detriment to the public. No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law."

But in the face of this principle, we have, in the cases at bar, these facts. Since the 23d of November, 1893, these

large corporations, owning taxable property of great value, have kept at a standstill the taxing machinery of the state so far as it affected them. Their property is not on the tax duplicate at any value whatever. This condition continues, although the Circuit Court, the Circuit Court of Appeals, and the Supreme Court of Ohio have decided that there is absolutely no merit in any of their claims. In bringing about this condition of affairs, the unprecedented action has been taken of enjoining a judicial board in the performance of its judicial functions, and a rule has been laid down which can be used to tie the hands of every ward assessor.

All this has been done on the plea that to do otherwise would entail a multiplicity of suits.

Which is better from the standpoint of this Court—this violent interference with the judicial action, this stoppage of the legitimate processes of government, and this unfortunate precedent for the future, or the annoyance and expense to these private corporations of certain litigation which they themselves threaten to institute, and which they may withhold? They ask this Court to sacrifice the public interest in order to protect them from a multiplicity of suits entered by themselves. They do not say that they apprehend they will be sued by numerous parties, such as their own stockholders, in the event of the enforcement of the tax, as was averred in the case of *Cummings* v. *National Bank*, above referred to; they threaten to enjoin every county auditor, or to sue every county treasurer; and then in effect say to a court of equity: "Save us from this multiplicity of suits by allowing us to do the unheard-of thing of enjoining judicial officers in the performance of their duties, and impede the process of taxation for years."

Appellants own property in nearly every county of the state, and instead of suing in each county, as any one else would have to do, they ask to be allowed to enter suit against a judicial board, that can not on principle be sued.

Now, suppose they owned property in only ten counties instead of fifty, or in only two counties instead of ten, would that entitle them to stop the proceedings of the board of appraisers and assessors? Could a farmer, owning property in two counties, enjoin the state board of equalization from making certain additions to the tax value of his property, merely to save him the trouble of entering an injunction suit, or a suit to recover back in each county? Where is the dividing line between two and fifty, and how many suits make a "multiplicity?"

Appellants' only objection to the remedy at law, or under the statute, when analyzed, is that it will cost more than a proceeding in equity. Is this a ground of equity jurisdiction? Appellants have a plain, adequate, and complete remedy at law. They can recover, if the law is invalid, the entire amount of taxes paid, and will suffer no injury thereby. They do not allege any irreparable damage, or cloud upon their title, or that they are threatened with a number of suits against them. They merely say: "To attack the validity of this tax in a court of law we will have to enter a number of suits, which will cost us more money and time than one suit now. We want to resist the payment of the tax which will be assessed against us, and although the mode of procedure we have chosen will greatly embarrass the officers of the state, and tie up the revenues to a certain extent for years, and will invade the sanctity which attaches to judicial, or *quasi*-judicial action—still it will be less expensive to us than an action at law, or the usual proceeding in equity under the statute, and we want you, a court of equity, to grant us an injunction."

It is no more burdensome for a corporation to enter fifty suits to recover twenty-five thousand dollars, because it has property in fifty counties, than it is for one private citizen to enter one suit to recover five hundred dollars, because he has property in only one county. The large amount of

litigation is an incident to owning a large amount of property, and equity can not relieve the wealthy from that burden.

Appellants are not entitled, upon any ground or under any circumstances, to an injunction against the *quasi*-judicial action of the board of appraisers and assessors; they have a plain, adequate, and complete remedy at law, or under the Ohio statute, and a court of equity, under its general jurisdiction, will not give appellants the relief they seek, nor any relief, against the state board.

VII.

THE BILLS DO NOT SHOW THAT THE AMOUNT IS LARGE ENOUGH IN ANY CASE TO INVOKE THE JURISDICTION OF THE UNITED STATES COURTS.

The bills do not show that the amount in controversy in the case in any one county exceeds $2,000, so as to entitle them to a hearing in the Circuit Court. The 1893 cases, Nos. 337 and 352, and the 1895 cases, Nos. 398, 399, 400 and 401, are entered against the state board or the state auditor, but their purpose is to prevent the exaction in each county of a tax which the complainants regard as excessive. As the payment is to be made in each county, and as the liability exists in each county, it is the amount in each county and not in the state at large which determines the jurisdiction of the court.

In the 1894 cases, the action is against the auditor in each county. Although they are joined in the suit improperly, still, in any event, whether properly joined or not, the injunction can not issue against any one of the county auditors, unless it appear by the bills that the amount involved in that county exceeds $2,000.

Not only so, but if the law is unconstitutional, then the laws which it repealed are in full force and effect. That is

to say, the companies are liable for the personal property tax paid by them before the enactment of the present law. The amount in controversy, therefore, is not the amount they have to pay under the law, but the difference between that amount, and the amount they would have to pay in any event. The bills must therefore contain averments that the appellants would be charged in a county or counties specified, a certain sum, which must be more than $2,000 in excess of what they would have to pay if this law were not in existence.

The bills do not contain any such averments. There is an averment that the "amount involved," or "the assessment levied against your orator" "in one or more of the counties of the state will exceed $2,000," but there is no statement of the exact or approximate amount, nor in what county or counties such assessment is levied. There must be a statement of the specific county or counties because, as we shall see, the injunction can be had only as to those counties in which the jurisdictional amount exists, and unless it appears that that amount exists in some particular county or counties, the whole action must be dismissed on the ground of lack of jurisdiction.

In the recent case of *Fishback* v. *W. U. Tel. Co.*, 161 U. S. 96, this question was decided. That case was in the first instance an action by the W. U. Tel. Co. against the state board of railroad commissioners and the county clerks, praying that the board be required to show grounds for its assessment of complainant's property under a certain law passed by the State of Arkansas, and that the county clerks be enjoined from levying the tax on the valuation thus made by the board of railroad commissioners. The injunction was issued too late, and so an amendment was filed, making all the tax collectors in the state parties, and asking for an injunction against the collection of the tax by them. The defendants demurred to the bill. The court said, p. 99 :

"It is argued that under the averments of the bill, the Circuit Court had jurisdiction on two grounds: 1. Diverse citizenship; 2. In that the case made by the bill was one arising under the Constitution and laws of the United States. Even if this were so, the Circuit Court could not take cognizance of the suit unless the matter in dispute exceeded, exclusive of costs and interest, the sum of $2,000.

"The rule is without exception that the facts upon which the jurisdiction of the courts of the United States rests must appear in the record of all suits prosecuted before them. The general averment in this bill that 'the amount or value in controversy in this suit exceeds the sum of $2,000, exclusive of interest and costs,' was a mere conclusion, and it was nowhere shown that the amount of any one of these distinct county assessments, the collection of which was intrusted to these tax collectors, exceeded that sum.

"Although, if these county assessments were aggregated, they would considerably exceed $2,000, yet the several county clerks or tax collectors can not be joined in a single suit in a federal court, and the jurisdiction sustained on the ground that the total amount involved exceeds the jurisdictional limitation, as already stated in Walter's case."

In the case of *Walter* v. *U. S.*, 147 U. S. 370, the action was against the treasurer and sheriff in four counties in South Carolina, to enjoin them from seizing the property of plaintiff for the purpose of collecting a tax against it. The court said, pp. 372–373:

"Under these circumstances, it is entirely clear that, had these taxes been paid under protest and the plaintiff had sought to recover them back, it would have been obliged to bring separate actions in each county. As the amount recoverable from each county would be different, no joint judgment could possibly be rendered. So, had a bill for injunction been filed in a state court, and the practice had permitted, as in some states, a chancery subpœna to be served in any county of the state, these defendants could not have been joined in one bill, but a separate bill would have had to filed in each county.

"Is the plaintiff entitled to join them all in a single suit in a federal court, and sustain the jurisdiction by reason of the fact that the total amount involved exceeds $2,000? We think not. It is well settled in this court that when two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit, it can only be sustained in the court of original jurisdiction, or on appeal in this court, as to those whose claims exceed the jurisdictional amount; and that when two or more defendants are sued by the same plaintiff in one suit, the test of jurisdiction is the joint or several character of the liability to the plaintiff."

In the case of *U. S.* v. *Sayward*, 160 U. S. 493, the court says, p. 497:

"It is clear that a Circuit Court can not, under that statute, take original cognizance of a case arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority, or of a controversy between citizens of different states, or of a controversy between citizens of a state and foreign states, citizens or subjects, unless the sum in dispute, exclusive of interest and costs, exceeds $2,000, because in immediate connection with the enumeration of each of such cases will be found expressed a limitation of that character in respect of the sum or value necessary to give jurisdiction."

The bills in the cases at bar do not show the existence of the jurisdictional amount in dispute, and the demurrers should be sustained for that reason.

In conclusion, we submit that the judgments of the courts below should be affirmed, for the following reasons:

First. Appellants have failed to allege the necessary jurisdictional amount; and they are not entitled to an injunction against a judicial board of valuation, in the performance of its duty.

Second. Separate causes of action have been improperly joined, and there is a misjoinder of parties defendant.

Third. There being no federal constitutional question in-

volved, and the jurisdiction, if it existed at all in the federal courts, resting solely on diverse citizenship, no appeal lies to this court from the judgments of the courts below.

Fourth. It has been conclusively settled by the Supreme Court of Ohio that the law is in conformity to the Constitution of Obio; and as to the federal Constitution, under the decisions of this Court, the tax and the method of valuation in the cases at bar are in harmony with the letter and spirit of that Constitution.

Fifth. There being no charge of fraud on the part of the valuing board, this Court will not attempt to review or correct the valuation made by the tribunal charged, under the law, with the duty of making it.

All of which is respectfully submitted.

THOS. McDOUGALL,
Of Counsel for Appellees.

HON. F. S. MONNETT,
Attorney-General,
AND J. K. RICHARDS,
Counsel for Appellees.

165-194

Corrected copy.

Supreme Court of the United States.

OCTOBER TERM, 1896.

Nos. 337, 338, 339, 340, 398, 399, 400, 469, 470, 471.

OHIO AND INDIANA EXPRESS TAX CASES.

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HENRY SANFORD, President of the Adams Express Company, *Appellant*,
337 *vs.*
EBENEZER W. POE, Auditor of the State of Ohio, *et al.*

HENRY SANFORD, President of the Adams Express Company, *Appellant*,
338 *vs.*
EBENEZER W. POE, Auditor of the State of Ohio, *et al.*

JAMES C. FARGO, President of the American Express Company, *Appellant*,
339 *vs.*
EBENEZER W. POE, Auditor, etc., *et al.*

THOMAS C. PLATT, President of the United States Express Company, *Appellant*,
340 *vs.*
EBENEZER W. POE, Auditor, etc., *et al.*

Appeals from the United States Circuit Court of Appeals for the Sixth Circuit.

CLARENCE A. SEWARD, Vice-President of the Adams Express Company, *Appellant*,
398 *vs.*
EBENEZER W. POE, Auditor of the State of Ohio.

JAMES C. FARGO, President of the American Express Company, *Appellant*,
399 *vs.*
EBENEZER W. POE, Auditor of the State of Ohio.

THOMAS C. PLATT, President of the United States Express Company, *Appellant*,
400 *vs.*
EBENEZER W. POE, Auditor of the State of Ohio.

Appeals from the Circuit Court of the United States for the Southern District of Ohio.

THE AMERICAN EXPRESS COMPANY, *Plaintiff in Error*,
469 *vs.*
THE STATE OF INDIANA.

THE ADAMS EXPRESS COMPANY, *Plaintiff in Error*,
470 *vs.*
THE STATE OF INDIANA.

THE UNITED STATES EXPRESS COMPANY, *Plaintiff in Error*,
471 *vs.*
THE STATE OF INDIANA.

In Error to the Circuit Court of Marion County, Indiana.

To the Supreme Court of the United States:

Your petitioners, the appellants in the above entitled causes, respectfully pray for an order directing a re-argument of the said causes upon the following grounds:

First.—The total insufficiency of the argument offered by the counsel for the appellants, due to a failure on their part to anticipate the grounds which have really led to the decision of the court.

Second.—The extreme importance and far reaching effect of the decision which has been announced, as bearing upon some of the most fundamental principles of constitutional law.

Third.—Its momentous practical importance as affecting existing interests, making it wholly impossible for the appellants to continue the express business of the country under the system of taxation sanctioned by the decision, in view of the natural tendencies of the different states to compel contributions from that business; tendencies against which the law affords the most meagre, if any, protection.

Fourth.—The entire novelty of the questions discussed and of the points necessarily determined by the judgment.

Fifth.—The fact that under the circumstances such failure on the part of counsel is not without reasonable excuse.

Sixth.—That the appellants believe and are so advised by their counsel, that a further consideration of the cases and a consideration of reasons which have not heretofore, in consequence of the failure aforesaid, been stated, will lead this Honorable Court to a decision in favor of the appellants.

Seventh.—We beg finally to suggest that upon the question whether the Nichols law denies the appellants the equal protection of the laws, this court has erroneously assumed that the taxing laws of Ohio classify property of different sorts for purposes of valuation.

And your petitioners respectfully ask for an attentive consideration of the paper annexed hereto, in which an attempt is made to more fully state and to support the grounds above mentioned, with such brevity, however, as the nature of this petition and the rule of the court requires, and they further pray that the above entitled cases be set down for re-argument before the court upon some day by it to be appointed.

And as in duty bound will ever pray.

JAMES C. CARTER,
LAWRENCE MAXWELL, JR.,
Counsel for Appellants.

We certify that, in our opinion, the foregoing petition for rehearing is well founded.

JAMES C. CARTER,
LAWRENCE MAXWELL, JR.,
Counsel for Appellants.

GROUNDS UPON WHICH THE RE-ARGUMENT IS ASKED.

First. The total insufficiency of the Argument heretofore offered by counsel for the Appellants due to a failure on their part to anticipate, in any adequate degree, the grounds which have really led to the decision of the court.

It is important in the first place that the precise substance and effect of the decision should be stated.

A review of the decisions of this court prior to the argument of the present cases and referred to in the opinion of the court just pronounced as being, in point of authority, the foundation of the decision is appended hereto in an appendix.

From this review it is believed that the following is a fair and just statement of the propositions actually determined by those decisions.

1. They rightly assume two principles as incontrovertible; first, that, so far as concerns the taxation of *property*, a state can not tax, as against non-residents, any property except such as has an *actual situs* within its limits; second, that no state can tax or burden in any form the business of interstate commerce.

2. That where a state *assumes* only to tax property *actually situated within its limits*, it does not violate either of the above principles if, in ascertaining the value, it adopts *the ordinary method* of assessment; or, where the ordinary method is not practicable, some other fair and reasonable method.

3. That in the case of railroad and telegraph companies, the ordinary method is not applicable, and the method of taking into view the value of the *whole*, in order to ascertain the value of the part, is fair and reasonable, at least so far as to justify an apportionment of value according to *mileage*.

The step now taken by the present decision is to evolve a new general proposition, not declared or distinctly discussed in any of the prior cases, that where there is what is called a *unity of use* between several pieces of property not united together by any physical tie, some of the pieces situated within and some without the state, the value of the parts within may be determined by the value of the whole, even though the part within is *physically separable, and is, as separated, an ordinary thing, having an ordinary market value based upon its capability of similar uses in a multitude of different businesses*, differing in nothing, so far as the ascertainment of value is concerned, from the thousand other classes of chattels which form the usual subjects of taxation.

No precise explanation is given of just what this *unity of use*, which involves such momentous consequences, may be; but it is held that the property of express companies is of that character.

This doctrine of the effect upon taxation of a *unity of use* was not discussed in the prior cases, and was not touched by appellants' counsel in the argument of these cases. The excuse for this omission will hereafter be given. But the argument which they thought abundantly sufficient to defeat the assessments consisted in pointing out that the property taxed was, both physically, and in respect of ownership, *capable of separation without altering its identity, or any of its properties, or its value, as ordinarily understood*, and would remain, after separation, an ordinary subject of taxation, and that to tax it as it was taxed under the Ohio law, was *in effect* to tax property outside of the state, and also the business of interstate commerce. This argument, which seems not to be disputed, must be regarded as rendering the validity of the taxation, at least, doubtful. The weighty dissent fairly entitles it to be so considered.

The additional arguments and illustrations which they might have adduced, but did not, are as follows:

1. The *unity* which makes the property so taxable is said in the opinion of the court to be dependent, not upon *physical connection*, or unity of ownership, but to be sufficiently constituted by unity of *use*.

But suppose the Adams Express Company should, in Ohio, *hire* all its horses, wagons, etc., as it easily might without materially affecting its business, and for the ordinary rates. The same *unity of use* would continue. Would the *owner* (the horses, wagons, etc., being worth $42,065) be properly assessed for taxation at $533,095.80, although he had no interest in the express business? If not, is there really any *unity of use* which justifies these assessments?

2. Again let it be supposed that the company *reduces* the amount of its horses, wagons, etc., to one half, not by hiring from others, but by *substituting human carriers*, which it easily might do without substantially affecting its receipts. This would not alter the proportions of mileage, or gross receipts, and therefore, although the amount of the property *purporting to be valued* were reduced one half, the *valuation would be the same*. And, supposing it hired all its horses, wagons, etc., *except one horse and wagon*, owning no other personal property than that, the valuation would still be unaffected.

3. If, however, it should hire *all* and own no personal property whatever, it would then be wholly relieved, for the assessors would be left without a subject for assessment: That is to say we have a scheme of assessing the value of the personal property owned by express companies in Ohio wholly unaffected by the amount which is owned.

4. Perhaps it may be suggested that the assessment would, in the case of hiring by the express companies, stand as an assessment not of the *property* but of its *use*. But under this

law, certainly, nothing can be assessed except the value of the *property*, and that against its *owner*. Let it be supposed, however, that this were otherwise, or that the law were changed so as to tax the *use*. Would the *owners* of the horses and wagons still be justly taxable on them, and on what amount? Or, would this property be exempt from further taxation? There would seem to be no just reason for not taxing it against the real owner, and on the full value; and in that case we would have a horse assessed at its true value, $150 to the *owner*, and at about $4,000 to the *user*.

5. And yet, in the case last mentioned, consistent reasoning requires that the owner should be exempt, for if the plant really be united it is *inseparable*, and if it remains *in* the unity for purposes of taxation, it can not at the same time be out of it for the same purpose.

It may, indeed, be suggested that the case would be one, after all, only of double taxation, and that this, however flagitious, is not a subject of criticism in a federal court. But we beg to refer to the opinion of Mr. Justice Brewer, in Cleveland, etc., R. R. Company vs. Backus (154 U. S. 439), repeatedly approved, and so recently as in the case of W. U. Tel. Co. vs. Taggart (163 U. S. 1), that it is only *fair, reasonable, ordinary, necessary* taxation which is, in such cases, a defence against the charge of violating both the fundamental principles above referred to, which principles are committed to the care of the Supreme Court.

6. But what shall be said of the pretence by Ohio that the different parts of the plant are an *inseparable unity* when she herself asserts that they are *not*, and, *in this same law*, actually separates them for the purposes of taxation? If all the property of the company composes, as is said, this united inseparable plant, then, certainly, the real estate in Ohio is part of it and an inseparable part; but that state finds no difficulty in

separating it, and imposes on the company an entirely separate assessment of $58,000 and upwards, on this account.

The real estate of the companies in Ohio is there assessed like that of other owners. The law requires *this assessed value* to be included in the return made by the companies to the board of assessors, and *adopts* it and taxes it accordingly and separately. It thus assumes and declares that the value of *this* property, although as much a part of the unity as any other, does *not* depend for its value, as it plainly does not, upon the use to which it is put, but upon the same elements which determine the value of all other lands and buildings in the state.

7. The principal idea which underlies the opinion of the court and is made to defend these extraordinary assessments is that the value of property is dependent upon the *use* to which it is put. We earnestly request the court to reconsider this proposition. It is an expression which has several times been employed to support the doctrine declared in the railroad and telegraph cases, and in the sense there intended is entirely just. In cases where the ordinary and nearly universal methods of ascertaining value can not be employed, where the thing to be valued has no market value, where it can not be *indefinitely produced*, where there is no *supply and demand*, there is a necessity of resorting to other considerations, and the *productiveness* of the property, in other words, the value of the *use* of it, is a *natural*, *ordinary* and *proper* inquiry; for if the thing were to be sold just as it is, that would be the inquiry of the intending purchaser. But this method is the creature of necessity, and should be carefully limited to that necessity. Can it be thought for a moment that this proposition should be made general and the value of property generally be held to be determined by the *use* to which it is put, and not at all by the fact that it is a common subject of sale in the market, and has a distinct

and certain market value? What would be said of a system of taxation of ordinary property wholly within a state, which should direct or permit an assessing board to displace the ordinary tests of value, namely, what the things are bought and sold for, and inquire, in each instance, into the profits which the owners made who use them, and then impute those profits to the particular thing, making houses and lands, horses and cattle, and all other chattels bear every variety of value? Such a system would be in violation of fundamental notions of right, and would make fairness and equality in taxation impossible. It would not be taxation, but arbitrary exaction. And yet this would be justified if the proposition under notice were sound.

If this is not sound as a *general* proposition, is it sound in any cases, and why is it sound in them? It is sound in cases *where there is no better method*, and sound because necessary.

We have referred to the opinion of the court in Cleveland, etc., Ry. Co. vs. Backus (154 U. S. 439), drawn up by Mr. Justice Brewer, as laying down the true reason (necessity) for the assessment of part of a railroad lying within a state, by a reference to the value of the whole. In that opinion there are, indeed, expressions to the effect that the value of all property is determined by its use, as if this were true as a broad and general proposition (p. 445); but did Mr. Justice Brewer really mean this? Did he mean that this was the ordinary test? Did he mean that where the common judgment of men, based upon all the elements of value, the *uses* to which the property may be put, *supply and demand*, etc., had established a value (for this is what is *ordinarily* meant by value) that judgment could be *disregarded*, and an assessing board be permitted to establish another value based on *use* alone, or did he mean that in those cases where common judgment had never had occasion to fix a value, and never had done it, and where, consequently, a value so fixed was not available, an assessing board was *obliged* to have recourse to

the original elements of value and make up, as best it could, a judgment? We have only to recur to the other parts of the opinion to see that the latter meaning was all that he intended.

8. What then is the precise error, as we humbly conceive it to be, in the decision? It finds that in the railroad and telegraph cases there was declared to be property actually situated within the state and therefore taxable there. The problem, as declared by the court, was to ascertain its *cash* value. There was no market value. The subject of taxation was not one capable of indefinite production, and not subject to the operation of supply and demand. To separate it from the use to which it was put would be to destroy it, and it would have no value, except as a ruin, for its materials. But yet it *had* a cash value which a purchaser would give for it, and this *in the purchaser's mind* would depend on the *use* to which it was put. Now in *those cases* the use to which the thing was put was in inseparable unison with other things, together constituting a whole, as much as a dwelling house which happened to rest on both sides of a state line, and the value of the whole was the material thing to be determined.

What the prior decisions establish is that where the value of a thing proper to be taxed can not be ascertained by ordinary methods, its *use* may be referred to, and where its use *is* in inseparable combination with a whole of which it forms a part, the value of the whole may be referred to. What the court now apparently construes that decision to be, is that wherever the *use* of a thing in one state is in combination with other things outside of the state as a whole, its value for taxation may be determined by a reference to the value of the whole, *notwithstanding* that there is no difficulty in physical separation or in separation of ownership, and notwithstanding that the part within the state has the same full and perfect value *after* separation which it possessed before combination. As to railroads and telegraphs the parts within

one state can not be sold, delivered and taken away by a purchaser without destroying the value. Let it be imagined that this could be done, and that the price were easily ascertainable, can it be thought that the method of assessment adopted in respect to them would have been sanctioned? It was the impossibility of this which was the ground and the sole ground of the decisions.

9. There is manifest from the face of the opinion an impression on the part of the court that there is equity and justice in the methods sanctioned, and that the express companies are seeking to avoid just contributions. This is most unfortunate. It should not be assumed where the question is alone as to the constitutionality of methods, for the records can not contain the facts upon which such an assumption can either be justified or repelled. The opinion contains this statement. "Considered as distinct subjects of taxation a horse is indeed a horse; a wagon, a wagon; a safe, a safe; a pouch, a pouch; but how is it that $23,430 worth of horses, wagons, safes and pouches produce $275,446 in a single year; or, $28,438 worth $350,519? The answer is obvious." It is not intended, we assume, by this language to impute to the appellants an assertion of the fact implied by those interrogatories. They mean that in the opinion of the court the horses, wagons, etc., sought to be taxed, are the real sources from which the large sums mentioned are derived; or that they may be justly so regarded for the purpose of taxation. But ought not this to be reconsidered and retracted? *Some* agency in producing these sums (for they are *gross* receipts) will, of course, be allowed to the physical labor of a large number of people, mere laborers, who must be paid out of the receipts; something more to the skill and superior talents of principals and subordinates who could earn, in various callings, large salaries, and some of them very large, and who must also be paid out of the receipts; something more to an

accumulated fund derived from past profits which furnishes the public with an assurance of responsibility; something more to those habits of patronage, commonly called good will; and a great deal to the services performed by the railroad companies, for it is a matter of common knowledge that the express companies are required to pay nearly one half of their gross receipts to the railroad companies for transportation. If fair and just minded men should deliberately estimate in the best possible manner the proportion to be awarded to each of these sources, would the amount properly to be ascribed to these horses, wagons, etc., be one particle more than is represented by their actual value as set forth in the returns? Certainly there is nothing perceived in these records which enables the court to say that there is, and the appellants assert most confidently that there is not.

There is evidently an impression that the contracts which express companies have with the railroads are sources of large profits. If this were the fact it is not perceived how it would affect the value of horses and wagons used by the companies; but the impression is erroneous. Railroad companies are as exacting as other persons in the compensation they demand for their facilities, and just as exacting towards express companies as towards others.

But why is it that all these receipts are imputed to the horses and other personal property? If one piece of property can be *selected*, and the entire receipts be imputed to that, why can not another piece be as well taken? Why can not the real estate in Ohio be taken and the personal property be dropped, just as well as to take the personal and leave out of view the real estate? The real estate in the case of both the Adams and the American Company is of more than twice the value of its personality, and yet that is not supposed, in the opinion, to contribute anything to the receipts.

10. It is said in the opinion that the appellants' returns of their property "did not take into account contracts for transportation and accompanying facilities." We are not advised whether the court means to suggest that such contracts constitute property which is subject to taxation by the states in which the railroads are situated.

(a) We submit in the first place that the statutes do not undertake to assess the railroad contracts of express companies as property. They do not require the express companies to return such contracts to the assessing board or direct the board to estimate their value. The Supreme Court of Indiana has so construed the statute of that state (Indiana Record 59) and its construction is binding upon this court.

There is nothing in the opinion of the Supreme Court of Ohio to indicate that it regards the railroad contracts of the express companies as *property* to be taxed under the Nichols law. On the contrary in Adams Express Co. vs. State, 44 N. E. Rep. 506, 508, they say:

"What is known as the Nichols law, held constitutional in State ex. rel vs. Jones, 51 Ohio St. 492, imposes a tax upon *property only*, and does not impose any tax for the privilege of exercising a franchise in this state."

(b) We submit that the express companies' railroad contracts are not *property*. They do not create in the express companies any interest or estate in the railroads. They simply reduce to writing, for purposes of convenience and certainty, the details of the service to be rendered by the railroads and the compensation to be paid therefor. The only property involved is the railroad, which belongs not to the express companies but to the railroad company, and which is taxed company, but to the railroad company, and which is taxed as such against the railroad company, and that too upon the basis of its value as affected by its earnings from express companies and other patrons.

The railroad facilities are no doubt valuable to the express

companies; indeed they are as essential to the conduct of the express business, as they are to the conduct of business generally. But that does not make them *property*.

In Exchange Bank of Columbus vs. Hines (3 Ohio St. 1), the Supreme Court of Ohio held that the franchise of a bank was not *property* subject to taxation under the Constitution of Ohio. The court, speaking by Bartley, C. J., said:

"Does a corporate franchise, in sober truth and reality, possess the essential qualities of property? It is said that the corporate franchise of a bank, conferring a peculiar legal capacity, and the high function of making and circulating paper money, is valuable—indeed, a thing of great value. But value is not the distinguishing attribute of property. The right of suffrage is esteemed valuable; a public office, with its emoluments, is valuable; a license to keep a tavern, as formerly granted in this state, or a license to carry on any special business which is prohibited without a special grant of authority from the government, may be valuable; and a right to either of these things may be asserted and maintained in a court of justice, yet neither of them possess the essential qualities which constitute property. Our right to the free use and enjoyment of things which are in common, such as air, light, water, etc., is valuable; and our right to the free use of the public highways, and to many of the privileges and advantages derived from the government may be valuable, and may be maintained by legal process. Yet none of these things come within the denomination of property. Those things which constitute the subject-matter of private property, are such as the owner may exercise exclusive dominion over in the use, enjoyment and disposal of them, without any control or diminution, save only by the laws of the land. 1 Wend. Bla. 138. It is a fundamental principle, that "property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them either by exchanging them for other things, or by giving them away to any other person, without any valuable consideration in return, or even of throwing them away, which is usually called relinquishing them." Rutherford's Institutes, 20 Puffendorf, chap. 9, b. 7.

"It is said that capability of alienation or disposal, either by sale, devise or abandonment, is an essential incident to property. 2 Kent. Com. 317. (3 Ohio St. 7, 8.)

In ex parte Gilchrist (17 Q. B. D. 521) it was held that a power of appointment under a deed or will is not the "property" of the donee. Fry, L. J., said:

"No two ideas can well be more distinct the one from the other than those of 'property' and 'power.' This is a 'power' and nothing but a 'power.' A 'power' is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is, in my judgment, no more his 'property,' than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognizes are they 'property.' In one sense, no doubt they may be called the 'property' of the person in whom they are vested, because every special capacity of a person may be said to be his property; but they are not 'property' within the meaning of the word as used in law. Not only in law but in equity the distinction between 'power' and 'property' is perfectly familiar, and I am almost ashamed to deal with such an elementary proposition."

(c) It has been said several times in opinions delivered in this court that it is not within the power of a state to levy a tax against a person engaged in interstate commerce for the privilege of constructing or using an instrumentality of interstate commerce (154 U. S. 445, 446). In Postal Telegraph Cable Co. vs. Adams (155 U. S. 688, 696) Mr. Chief Justice Fuller said:

"Doubtless, no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or inernational commerce, or for the carrying on of such commerce."

The express companies must use the railroads. For convenience they must reduce to writing the terms under which the railroads perform services for them. But the states can hardly be permitted to tax express companies for the privilege of employing railroads to render service in interstate commerce; or tax as property contracts which create in the express companies no interest or estate in property. But it is not necessary to enlarge upon this point, for the reason that, according to the decision itself, the contract can only be reached as being an inseparable part of the *whole plant* of the company, of which the horses, wagons, etc., are another inseparable part. If the notion of a *unity* falls, there can of course be no ground upon which the contracts can be made to add anything to the value of the property assessed in Ohio. Account might just as well be taken of any other part of the property of the company as of the contracts referred to. If the notion of unity is not maintainable, it follows necessarily, that any attempt to add to the valuation of the horses and wagons by a reference to anything except the intrinsic value of those articles themselves, must fail.

11. It must certainly be admitted that a *part* of an assumed unity can not be valued by a reference to the value of the whole as determined by its productive use, unless the *whole* could be properly so assessed. It must therefore follow that a state in taxing properties wholly within its limits may properly tax things *united in use* as a whole, by reference to the supposed productiveness of the whole. Would it be endurable to tax *farms, cattle, hay, tools* and all as a *unity*, by a reference to productiveness, instead of by the ordinary method? And is an express company more of a unity than ordinary farms?

12. Mr. Justice Brewer declared, in the opinion so often referred to by us, that if a taxable thing were situated within the limits of a state and *had a cash value*, the fact that such value was in part derived from the circumstance that it was

an instrumentality of interstate commerce was immaterial; and he might with equal truth have added that if its value were, in part, derived from its use in inseparable connection with other property actually situated outside of the state, that circumstance would be immaterial. In both instances it is the value only of property actually situated within the state which is taxed.

But let it be supposed that there are multitudes of the *same things*, situated in the *same state*, all equally *capable* of being used as the *same instrumentalities*, and all having an *ascertained ordinary value*, can an assessing board disregard *this* value and recur to the original elements which are supposed to make value, or to *one* of them, namely, *use*, and declare *another* value, twenty, or a hundred times greater? If it can, we are out of the domain of law, and without a defense against injustice and oppression.

The main defense against unlimited oppression in the name of taxation lies wholly in the *rule* which limits assessors to *ordinary* value. Even with that rule much oppression is possible, for in many instances just men do not agree as to the value when the ordinary rule is applied. But when the rule is discarded there is scarcely a limit to the possible abuse. It must be laid aside in *some* instances; but necessity alone should be held sufficient to justify it.

13. True, indeed, *use* is one of the elements which give property its value; for, unless a thing is *useful*, it has no value; but it is not the *actual use*, but the *capabilities of use* which constitute the effectual element. The value of horses in Ohio, aside from the effect of supply and demand, comes from the fact that they are capable of use for ~~but one~~ many different purposes. If they were capable of use for but one purpose, the demand would be infinitely smaller and the value less. The value of horses in Ohio is affected, therefore, by their capability of use in the express business, and every

horse in Ohio is equally capable of this use, and their market value is based, in part, on that fact. Are the horses actually employed in this use any more *capable* of it than others?

The part situated in Ohio of a long line of railroad is *capable of no other use*, and there are no other *like* pieces of property situated in that state and capable of being applied to a multitude of other uses, which can be substituted in place of the piece actually used. If the case were otherwise such pieces of railroad would have a market value in Ohio. In that case could such market value be set aside and the roundabout and complicated method of ascertaining the value of the whole line, involving, in effect, taxation of property situated outside of the state, and burdening interstate commerce, be substituted in order to reach another and an artificial value?

If the only use of horses, wagons, etc., in Ohio, was in the express business, and they had no other value except that dependent upon such use, then the authority of the railroad cases might more justly be invoked, and the rules there sanctioned applied.

14. If we were to put the doctrine of the Ohio scheme in its scientific form, it would be as follows:

"It is true that the Ohio law authorizes the assessment only of the horses, wagons, etc., of the express companies; yet it *identifies* these by an *intellectual fiction* with an indivisible part of what is imagined by another intellectual fiction as the 'profit producing plant' of the express companies; and, therefore, the value of that indivisible part is properly ascertained by reference to the value of the whole."

But we beg the attention of the court to the maxim that *intellectual fictions* are to be resorted to only for the purposes of *justice*, *convenience*, *certainty* and *order* in the law. Here they are resorted to (we must not say for the *intentional* purpose), but, certainly, with the necessary effect of

bringing about the very opposite results, which is substantially the same thing.

And we beg further to say that if the state of Ohio is authorized, for the purposes of taxation, to *identify* by an intellectual conception the horses, wagons, etc., with an indivisible part of an *imagined thing*, it must be for the reason that such indivisible part of an imagined thing might *itself* have been *directly* subjected to taxation. Can this be possible?

But in the case of railroads and telegraphs no intellectual fictions are employed. The parts in one state are *real* indivisible parts of *real* wholes.

15. The rules approved in the railroad and telegraph cases are based upon *necessity*. The decision in these cases takes a rule founded on necessity and follows it and extends it, as a new point of departure, just as if it were founded on *principle*, and applies it where no necessity exists.

We respectfully ask the court to consider the certain error which results from such a method. A rule adopted from necessity is, *confessedly*, susceptible of no other defense, and therefore *wrong*. If it were defensible upon other grounds, it would be put upon such grounds, and necessity would not be resorted to. Hence, rules founded on necessity are *never to be extended*. If other cases of necessity arise, that necessity will dictate its own rules.

Let us illustrate: The electric power works in which many millions have been invested at Niagara Falls, may largely furnish their power by wires through Canada and Pennsylvania. Those states will have the right to tax the property situated in their respective limits. There will be no *market* or *ordinary* value to it. Consequently, the value must be ascertained by reference to other things. The rule of *mileage* will plainly not be applicable, nor that of gross receipts. Necessity will force the adoption of the best practicable method.

16. The sleeping car case stands upon necessity, but of a very different sort from that of the railroad and telegraph cases. The difficulty was occasioned by the circumstance that the cars were constantly moving from state to state; they had a physical *situs* in one as much as in another; but the whole could not be said to have a situs in any one. Some method of ascertaining the number and value of the cars in Pennsylvania was necessary. The method adopted was assailed on the ground that capital stock was not taxable. This objection was not good, for capital stock was held not to be taxed, but the cars only. If the method had been attacked on the true grounds it would have been perceived that there was a better way. The method adopted was thought to be effectual to determine the average number and value of cars used in Pennsylvania, and this seems not to have been contested by the Pullman Company. The better way would have been that suggested by Mr. Justice Matthews in Marye vs. Baltimore & Ohio R. R. (127 U. S. 117, 123) cited and approved by the court in the Pullman cases, to-wit, to ascertain and appraise the average number of cars habitually used in the state.

If the horses, wagons, etc., of the express companies, were constantly on the move from one state to another, the decision in the Pullman case would have defended, not indeed the methods actually adopted in the express cases, but some method which would answer the necessities thus presented.

17. Taxation is administrative business, and the system must be workable; but the method sanctioned by the decision is wholly unworkable. It is wholly repugnant to all other parts of our systems of taxation, and would compel a revolution in them; and the oppression and injustice which would follow would be unendurable.

a. What is to be the effect on the ordinary methods of assessment in the various states? If various pieces of property

used in connection in different states are to be taxed as part of a unity in some of the states, it must be in all, and the separate value of the parts be disregarded, and real and personal be alike included in the unity. The practice now universal of taxing persons and corporations in the state of domicile for all personal and real estate except such as is physically situated elsewhere must be abandoned in the case of things *united in use*.

b. Each state is the judge of the size of the part over which it has jurisdiction, and when the separate parts are ascertained they may (they certainly will) amount to twice, or thrice the whole, and, very probably, even more.

c. Against this injustice and oppression the law affords no defense. There is no common tribunal which can determine the value of the whole and of the separate parts.

If an appeal be taken to this court, the answer will be "We can not review determinations of fact," and yet the whole mischief lies in determinations of fact.

In one state the proportion will be reached by a comparison of *mileage;* in another by a comparison of *gross receipts*. Upon what principle can this court declare that one is wrong and the other right?

d. An avalanche of litigation impossible to be dealt with will be the result. The victims will of course resort to this court before submitting to absolute ruin. The exactions they will show will shock the sense, and yet no fraud can be proved, and no rule invoked by which the exactions can be reduced to just sums. And the necessities for relief will, as they always do, subject just and established rules to a strain under which they will break down.

e. It is taxation without representation; with all its evils. The citizens of Ohio can compel each other to establish justice and equality as between themselves. But what means have the citizens of New York to resort to to compel justice at the hands of the citizens of Ohio?

Second. The extreme importance and far-reaching effect of the decision which has been announced as a determination upon some of the most fundamental principles of constitutional law.

1. The Ohio method of taxation, once sustained by this court, will be followed in every state in which the express companies carry on their operations, even in the state of domicile, and as to such companies, at least, two practices, one or the other of which have heretofore been universally adopted, can no longer be followed, at least without the inevitable consequence of double taxation. These practices are (1) that of taxing corporations in the state of their domicile upon the value of their capital stock, excepting therefrom the value of tangible property actually situated in another jurisdiction; (2) that of taxing corporations in the state of their domicile, upon the value of their property in that state without reference to capital stock, and assuming that all intangible property has its situs for the purpose of taxation within such state. We say that these practices must be abandoned or double taxation will be the result. This is an under-statement. Treble or quadruple taxation will be the more probable consequence. And there will be no way of preventing this, for the assessments in the several states (and there may be forty) will be entirely independent of each other, with no common supervising authority to correct their errors or reconcile their inconsistencies, and there will be an irresistible temptation in each state to compel the citizens of other states to pay as large a share as possible of their own expenditures.

2. It seems also to follow that states favorably situated in respect to interstate commerce, like New Jersey, Pennsylvania, Ohio and Indiana, will be easily enabled by an application of this method to compel enormous contributions from the citizens of other states for the natural facilities which

passage through their territories affords; contributions, to which, in an international point of view, no objection can be made, but a surrender of which it was one of the prime objects of the Constitution to compel in consideration of other advantages afforded by union, and which power those states certainly did surrender upon coming into the union.

3. These consequences can not be limited to the case of the express companies, but must be applied in all instances where companies, or even individuals, carry on business operations in different states, and whose property can be justly said to be blended together by what is called in the decision "a unity of use."

4. The framers of the Constitution intended to create what would be, in substance, one country; at the same time they could not dispense with the existence of sovereign states. And as a substitute for the ordinary remedies, as between sovereign states, of war and retaliation (resorts no longer admissible) they provided the following safeguards: (1) First and foremost, the fundamental principle that the property of the citizen of one state could not be taxed by another unless it had an actual situs within the latter. (2) By making it impossible that any state impose any burden, by way of taxation or otherwise, upon any of the instrumentalities of interstate commerce. (3) By declaring that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." These provisions, however, would be of comparatively little value if their interpretation and enforcement were allowed to rest with the states themselves; and therefore, another provision was added, namely: (4) a power to transfer, in certain cases, judicial proceedings in the states to the courts of the United States, and in other cases to subject the decisions of the former to review by the latter. These latter safeguards, quite efficient in many cases, would be substantially powerless in relation to the matter of taxation. Proceedings to assess property can not be trans-

ferred, and indirect review is effective only when distinct principles of law are violated, whereas, in the determination of the value of property, opinion and discretion are the effective elements and the exercise of these by the state officers, can not be effectually supervised, checked or restrained. If an attempt is made to tax the property of a non-resident not having an actual situs in the state, the safeguard is entirely effectual. If the ordinary rules limiting assessment to value as value is ordinarily understood, are applied, a protection is secured equal to that which a citizen has in cases of the assessment of his property in his own state. If these rules of valuation are allowed to be disregarded or superseded by another as to which there is no safeguard, a citizen of one state has no defense against the exactions which may be imposed upon him by another. These United States will cease, in many of the most important respects, to be *one country*, but will become *independent nations*. And this, too, without the protection which independent nations have against each other in the mutual dread of retaliation of war.

Third. The immediate practical importance of the decision in its direct effect upon the express companies.

In the deliberate judgment of those companies the stroke is a crushing one. They are left at the mercy of the mere caprice of assessing boards all over the country; for this system of taxation establishes no standard or criterion by which the amount of the assessment can be tested or restrained. It may be a half million, as in Ohio, or a million and a half, as in Kentucky. This year it is a half a million in Ohio, but she is not likely to be content with less than Kentucky, and next year Ohio may make it two millions, and the courts will be powerless to afford relief.

The express companies concede that it is not unjust, in view of the small amount of property which they use in their

business, as compared with the police protection which they receive, to lay a tax upon them, in addition to a property tax. Many states, including Ohio, levy such additional tax. Where it is laid by a reasonably definite rule, such as percentage upon gross receipts from state business, the companies have the protection of law; but the evils of a system, such as the Nichols law, which sets up no standard that can be tested by any rule, are intolerable.

1. That every state will resort to this new device, now that it has been pronounced legal, must of course be regarded as certain. A proper view of their own interests would require them to do so. The complaints of the citizens in each state at the burdens of taxation imposed upon them, growing louder and louder every year as that burden increases, will compel all assessing officers to impose as much of the burden as possible upon those whose complaints they can afford to disregard. What limit, indeed, can be placed upon the extent to which the people of a state will compel foreigners to bear the burden of their expenditures, if they have neither war nor judicial interference to apprehend?

The device of Ohio was immediately imitated by Indiana and Kentucky even before its validity was tested. That other states did not follow it is imputable only to the circumstance that they believed this court would promptly condemn it. But immediately upon announcement of this decision the legislative machinery has been started; and while these words are being written intelligence has come that bills for similar schemes have been introduced into the legislatures of more than one state.

Fourth. The novelty of the questions discussed, and of the points necessarily determined by the judgment.

Upon this point no observations are needed. It is believed that no one will say that such a method of taxation has ever heretofore been practiced in any civilized country, in respect

to property having a market value and distinctly separable without affecting that value from the business with which it is connected.

Fifth. The fact that under the circumstances such failure on the part of counsel is not without reasonable excuse.

The insufficiency of the argument of the appellants was two-fold: first, in not embracing a review of authorities which it now appears by the opinion of the court are deemed decisive of the question; second, in not subjecting the theory of a *unity of use* to a thorough scrutiny, showing the grave objections to it.

The excuse for the omission of a review of the prior decisions is this: The cases of railroad and telegraph companies are, it will be agreed, to say the least, very different from that of express companies. They are assimilated to it in the opinion of the court on the ground that the property of the latter constitutes a unit profit producing plant, an idea which, it will be admitted, has never before been entertained by this court. The extreme differences between the case of express companies and the class of companies above mentioned would alone have justified a hesitancy on the part of counsel in bringing into the discussion the decisions in the latter class of cases as being too remote. But, more than this, this court had in substance declared them inapplicable. It had said, in Pacific Express Co. vs. Seibert (142 U. S. 339-354): "On the other hand, express companies, such as are defined by this act, have no tangible property of any consequence subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts for business transacted;" that express companies were "entirely dissimilar in vital respects, as regards the purposes and policy of taxation, from railroad companies and the like owning a large amount of tangible and other property subject to taxation under other and different laws and upon

other and different principles," and that "in the nature of things, and irrespective of the definitive legislation in question, they belong to different classes."

The opinion of the court disposes of Pacific Express Co. vs. Seibert by saying that Mr. Justice Lamar's reference was "to the legislation of the state of Missouri, and the scheme of taxation under consideration here was not involved in any manner." But the objection there made to that legislation (which imposed a tax on the gross receipts of the express company) was that the statute violated the fourteenth amendment in denying to express companies the equal protection of the laws, because it did not impose a similiar tax upon other persons, such as railroad companies, engaged in similar occupations. The answer of this court to that contention was, in the "language of Mr. Justice Lamar, that express companies were *entirely dissimilar* as regards the purposes and policy of taxation from railroad companies," and that "in the *nature of things*, and irrespective of the *definitive legislation of Missouri*, they belonged to *different* classes;" and because they belonged to different classes, the court held that the statute of Missouri, which imposed a tax upon them, that was not laid on railroads, was not in contravention of the provision of the Federal Constitution, which vouchsafes the equal protection of the laws.

It is now, however, declared by the court that the prior decisions of the court in the railroad, telegraph and sleeping car company cases do decide, in principle at least, the very point raised in the present cases, and this opinion is reached without the benefit to the appellants in the present case of a close review of those decisions for the purpose of showing that such is not the fact.

As to the omission to scrutinize the foundation of the theory of a *unity of use* as a basis of taxation, the reason is the same. It had never been stated, in terms, by this court.

In the Gloucester Ferry case it had been urged by the Attorney General of Pennsylvania under the plea of a "homogeneous unit" (114 U. S. 201) and repudiated by the court. The railroad, telegraph and sleeping car decisions had made no allusion to it. These were put on other grounds stated in the review hereto annexed. The notion is the invention of the Supreme Court of Ohio. How could counsel think it necessary to discuss such a theory when it had been so plainly intimated by this court that express companies, at least, could not be dealt with in such a way?

Sixth. The denial of the equal protection of the laws.

If property generally in the State of Ohio were assessed for taxation on the basis of the Nichols law, the express companies would have no substantial ground of complaint, because, in that event, the property of all other owners would be valued for taxation on the same basis as that of express companies, and while the amount of all assessments would be tremendously increased, the rate would be proportionately reduced, and the proportion of taxes paid by the express companies would not be increased. The practical injustice of the Nichols law lies in the fact that the property of express companies is valued for taxation according to the principles of that law, while all other property in the state is valued without reference to the earnings of the owner or the profitableness of the use to which he puts his property. Merchants, manufacturers, banks, brokers, newspapers, gas companies, street railway companies, indeed all persons and corporations engaged in business in the state, except the companies covered by the Nichols law, are taxed without the slightest reference to the profits of their business. The market value of the shares of a bank, for instance, may be greatly in excess of the value of the bank's assets, owing to good-will and a large deposit account, but its shares are assessed upon the simple basis of the cash value of the assets of the bank, after deduct-

ing its liabilities. The market value of the shares of a newspaper company may, on account of heavy circulation, largely exceed the value of the assets of the company, but it is taxed only upon the ordinary cash value of its printing presses, and other appliances. In assessing a merchant or manufacturer for taxation, no inquiry is made as to the profitableness of his business, or if the business is conducted by a corporation, as to the par or market value of its shares. The assessment is laid upon the ordinary cash value of the tangible assets of the business.

All owners are not assessed by the same assessing officer or board, but the *basis* of *valuation* is the same, and absolutely without exception, except under the Nichols law. It was for the purpose of pointing out this unjust discrimination of the Nichols law that we printed in Exhibit Book (15-38) all of the statutes of Ohio governing the taxation of personal property.

We respectfully submit that the court has mistaken those statutes in assuming in the language of the opinion that "the policy pursued in Ohio is to classify property for taxation," and that "property of different sorts is classified under various statutory provisions for the purpose of assessment and taxation." There is not and never has been, in the state of Ohio, any classification affecting the *method* or *basis* of *valuation* of property for taxation except that introduced by the Nichols law.

The case of Wagoner vs. Loomis (37 Ohio St. 571) cited by the court in support of its statement, involved the taxation of shares of a national bank; but it will be seen by referring to the opinion in that case, or to the statute providing for the assessment of such shares, that they are estimated for purposes of taxation, not at their par or market price, but by taking the ordinary cash value of the bank's assets and dividing the sum by the number of shares.

We have never meant to dispute the rule so often an-

nounced, and reaffirmed in the opinion, that the fourteenth amendment does not prevent a just classification of property for taxation. What we complain of is the adoption of a method of *valuation* which applies to those covered by the Nichols law and to no other owners, with the effect of increasing the assessments against express companies twenty-fold.

A motion for a re-argument does not require, and the pressure under which it is made does not permit elaboration. The above suggestions are but a part of those which may properly be urged; but they are the principal ones. Are they not enough to justify the indulgence of a further full opportunity to complete them by weaving them into a connected argument such as the court has not yet heard, designed to show that the scheme of taxation framed under these recent laws is not consistent with the Constitution of the United States?

Respectfully submitted,

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REVIEW OF SOME OF THE AUTHORITIES RELIED UPON IN THE OPINION OF THE COURT.

Pullman Palace Car Co. vs. Pennsylvania (141 U. S. 18).

In this case the taxes challenged were levied under statutes of Pennsylvania, imposing, in form, taxes on the capital stock of corporations incorporated by the laws of Pennsylvania or of any other state and doing business in Pennsylvania, to be computed on a certain percentage of dividends made and declared. It was *treated* as being not a tax on capital stock, but on property. The tax was made to depend partly upon the value of the capital stock, and partly on the amount of dividends, and the tax would, therefore, be dependent in part upon the value of the capital stock as ascertained in the manner provided by the act. So far as appears from the case the only questions to be determined were those stated by Mr. Justice Gray at the opening of his opinion, which was that of the court. "Upon this writ of error whether this tax was in accordance with the law of Pennsylvania is a question on which the decision of the highest court of the state is conclusive. The only question of which this court has jurisdiction is whether the tax was in violation of the clause of the Constitution of the United States granting to Congress the power to regulate commerce among the several states. The plaintiff in error contends that its cars could only be taxed in the state of Illinois, in which it was incorporated and had its principal place of business." We understand by this that the plaintiff in error took two grounds: First, that the taxation of such railroad cars at all, when in actual use, was a burden upon interstate commerce, and therefore void. Second, that if such cars were subject to taxation at all they could be taxed only where the corporation had its domicile, which was in Illinois.

The point involved in our express cases is, whether in

assessing the value of the personal property of an express company, which has confessedly an ascertainable market value, such market value can be totally disregarded and superseded by reference to another criterion which has no relation whatever to value, as that term is commonly understood, and especially by reference to the value of a right to prosecute interstate commerce.

How these points can be supposed to have been determined by the discussion and determination of the questions above stated, as arising in the case of the Pullman Car Company against Pennsylvania, is not easy to see. Upon perusing the opinion in that case, it will be perceived that it begins by an emphatic statement and maintenance of the rule that property is not subject to taxation by a state unless it has an actual situs therein. It was manifest that the sleeping cars had an actual situs outside of the place of domicile of the company owning them, and therefore that they were justly taxable outside of that state. The puzzle was that they had this actual situs as much in one of several other states as another. Each might put in a claim that a situs was within its own territory exclusively. Such exceptional cases of course justify a resort to exceptional methods. The real problem was to ascertain how much of this sleeping car property was fairly to be treated as having a situs in Pennsylvania. The actual method which was sanctioned was not subjected to discussion. What was insisted upon by the company was that *no* method was allowable. If the horses, wagons, etc., used by the express companies in Ohio had been, in point of fact, used in a similar manner in half a dozen different states, the decision in the sleeping car case would have justified the adoption of some equitable method of ascertaining to how many of them a situs in Ohio should be assigned. Upon the other point, as to whether taxing these sleeping cars was imposing a burden upon interstate commerce, there is nothing certainly opposed to our contention. We have never

asserted, in the remotest degree, that the horses, wagons, harness, etc., of the express companies in Ohio are in any way relieved from taxation because employed in interstate commerce.

If the sleeping cars, the taxation of which was the subject of dispute in this case, had been entirely confined in their operation and use to the state of Pennsylvania, and had been proved to be of the value of $10,000, and had, by a reference to the capital stock of the Pullman Car Company and the proportion of its lines within the state to that outside of it, been assessed at the value of $200,000 each, and the question had arisen as to the validity of such an assessment, a decision sustaining the assessment would have been authority in this case. The appellants' counsel can not help thinking that if such had been the question, the taxation sustained in that case would have met a different fate.

There is indeed, in the opinion of the court, the following statement: "The tax on the capital of the corporation, on account of its property within the state, is in substance and effect, a tax on that property," but this statement can not be regarded as any part of the decision, because no issue was joined on it, nor was it subjected to any discussion whatever, as will be seen by the observation which immediately follows, namely: "This is not only admitted, but insisted on, by the plaintiff in error," that is to say, the opinion deals with the case of the plaintiff in error upon its own avowed assumptions.

It may be asked, however, if we admit the correctness of the proposition thus stated by the court. We do admit it fully in the sense in which it is declared in one of the two cases cited which affirm it. Nothing is more common than attempts by a state, where they are precluded by constitutional principles from taxing directly a particular item of property, to reach the object indirectly by imposing a tax upon some other thing which includes it or is dependent upon it. Wherever such an attempt is made it ought to be denounced

and defeated. The first case referred to by Mr. Justice Gray, Gloucester Ferry Co. vs. Pennsylvania (114 U. S. 196), was one of that character. The state of Pennsylvania wanted to tax a ferry boat belonging to a New Jersey corporation, which was employed on a ferry across the Delaware river, and which was, of course, from time to time, within the territory of Pennsylvania. It could not, it was admitted, do that directly. It sought to do it indirectly by attempting to impose a tax upon the capital stock of the New Jersey Company. This court promptly declared, as it ought to have done, that that was in substance and effect the same thing. What better authority could be found than this to support the contention of he appellants? The state of Ohio had, in every way which ingenuity could suggest, taxed everything which it had a right to tax against these express companies. It wanted to tax the capital stock. It knew that this could not be done directly. It sought to accomplish the same thing indirectly by imputing an utterly fictitious value to personal property owned by that company in the state and subject to taxation. What ought to be said in this case (a proposition laid down by Mr. Justice Gray in the case of the Pullman Car Company against Pennsylvania, abundantly sustained by the Gloucester Ferry Company vs. Pennsylvania, and by many other cases) is, that the state of Ohio, not having the right to tax the capital stock of these express companies directly, must not do it by the device which it has sought to employ.

It should hardly be necessary to say, however, that when a court stigmatizes an attempt by a state to tax specific property within it which it has no right to tax, by saying that an indirect effort to accomplish the same thing by an attempt to tax capital stock can not be permitted, it does not mean, by any means, that the taxing of specific property and the taxing of capital stock are so far identical that one may properly be resorted to wherever the other can be employed. Specific property belonging to a corporate body may have an

actual situs within a state, and therefore be the subject of taxation, but it by no means follows from this that the capital stock or some portion of it, of such corporation, has such actual situs.

The case of Maine vs. Grand Trunk Ry. Co. (142 U. S. 217) was, as the court declares in the beginning of its opinion, "*an excise tax* upon the defendant corporation for *the privilege of exercising its franchises* within the state of Maine. The subject matter of the tax was confessedly one within the taxing power of the state. There must necessarily, therefore, be some allowable mode for ascertaining the value of that privilege. The mode adopted was by a reference *to comparative gross receipts*. What error can be suggested in such a method, especially when, as in Maine, it was the one adopted as to domestic corporations of the same character? How can such a case, which was not that of a tax upon specific property, nor one in which the method was by a reference to the value of capital stock, nor one in which the amount of the tax was dependent upon the supposed value of the subject taxed, nor one in which, if it were so dependent, the subject taxed had a fixed value, be regarded as an authority upon the questions in these express company cases?

In the case of Pittsburg Railway Co. vs. Backus (154 U. S. 421), the tax assailed was one upon that part of the railroad property situated within the state of Indiana. The law under which the tax was imposed did not lay down any rule, as in these express company cases, for the *guidance* of the assessing board in determining value, but required it to assess it at its "actual cash value." It did, however, require statements which indicated that the board might and should look to the value of the whole road in determining the value of the part.

This mode of assessing property of a railroad company, un-

doubtedly within the state, was put in this case, as in a prior case cited in the opinion, upon its true ground *necessity*. Are these cases authority for another in which the whole basis of the decision is wanting?

The next case cited in the opinion of the court is that of the Cleveland Railway Company vs. Backus (154 U. S. 439). The special attention of the court is respectfully called to the opinion. It was a case of taxation of railroad property under the same law as in the case last above mentioned, but the validity of the method was more emphatically assailed in argument, and was considered by Mr. Justice Brewer with great candor and deliberation. He was evidently not insensible to the abuses possible in the case of the imposition by one state of taxes upon the property of citizens of another state; but he properly recognizes the fact that it was right and indeed necessary that such taxes should be imposed. He upheld this method of assessment upon the obvious ground that it was the *true and natural method* which the individuals would employ, and was indeed the only practicable method; and that either such method *must* be adopted or the property be suffered to go exempt of taxation. He insisted that in the case of *such* property "there is no pecuniary value outside of that which results from such use;" and that it was impossible to disintegrate the value of that portion of the road within Indiana" (p.445). He affirmed the rule that no state must put any burden in any way upon interstate commerce, but declared that "the taxation of property *according to the ordinary rule of property taxation*" did not violate that rule.

We respectfully invite the attention of the court to the whole of this opinion, and especially to so much of it as is on pages 443-447. Is it possible to think that if in that case it had appeared that there was "outside of the use to which the property was put" a distinct and clearly ascertainable pecuniary value, that the property could be separated from

the use to which it was put, and bear the same value which it possessed before it was put to that use, that such property was *ordinarily* taxed in a wholly different way, and that the whole field of invasion of these rules which forbid the taxation of interstate commerce, or of property outside of the jurisdiction would be thrown open if the ordinary method should be displaced, the decision would not have been the other way?

The last case cited by the court is that of the W. U. Tel. Co. vs. Taggart (163 U. S. 1). The decision was to the effect that the value of the easements, poles, wires, etc., of a *telegraph company* within a state were subject to the same rules of taxation as are applicable to the case of a railroad company. Nothing is perceived in this doctrine which has any direct bearing. It is relevant however in one respect, namely, that for the true defense of the principle of taxation as applied to the cases of railroads, it quotes very largely from the opinion of the court read by Mr. Justice Brewer, in the case of Cleveland, etc., Railway Company vs. Backus (154 U. S. 439) above referred to, and adopts the reasoning laid down in that opinion.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 469.

THE AMERICAN EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF INDIANA.

No. 470.

THE ADAMS EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF INDIANA.

No. 471.

THE UNITED STATES EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF INDIANA.

IN ERROR TO THE MARION CIRCUIT COURT OF MARION COUNTY, INDIANA.

FILED MARCH 19, 1896.

(16,229, 16,230, 16,231.)